18849

DOCUMENT NO. 821
Fall 2015

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

TABLE OF CONTENTS

EDITORIAL COMMENT

This edition of MLA Report contains newsletters of the Association's Committees that were issued in connection with the Fall Meeting in Bermuda in October 2015 as well as the Spring 2015 newsletter of the Committee on Marine Insurance and General Average, which was inadvertently omitted from the Spring 2015 edition of MLA Report. At the Fall Meeting, the Committee on Young Lawyers anchored the Association's Continuing Legal Education ("CLE") program with four presentations on "Hot Topics" in maritime law. We are pleased to include the papers for all of these presentations in this edition together with Douglas Stevenson's paper entitled "Introduction to the Maritime Labour Convention, 2006", which was also presented as part of the CLE program. We thank Benedict's Maritime Bulletin for granting us permission to reprint certain of these papers, which first appeared in its Volume 14, No. 1 (First Quarter, 2016).

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite-checking assistance in the preparation of this edition: Corey R. Greenwald of Clyde & Co. US LLP in New York; J. Ben Segarra of Maynard, Cooper & Gale PC in Mobile; Stephanie Propsom of Fincantieri Bay Shipbuilding in Sturgeon Bay; and Christine M. Walker of Fowler White Burnett PA in Miami. We appreciate their help. However, we remain responsible for any errors or ambiguities that may have escaped their and our view.

As in the past, we remind readers that the articles, case notes and comments published in the MLA Report are for information purposes only, are not intended to be legal advice and are not necessarily the view of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

COMMITTEE ON CARRIAGE OF GOODS

Editor: Michael J. Ryan
Associate Editors: Edward C. Radzik
David L. Mazaroli

CARGO NEWSLETTER NO. 66

Fall 2015

Triangle Edition

HOT BEANS GET COOLED OFF…

Yoly Farmers Corp. v. Delta Air Lines, Inc., No. 15 CIV. 2774 BMC, 2015 WL 4546744 (E.D.N.Y. July 28, 2015).

Plaintiff brought suit with respect to seven shipments of fresh vegetables from Santiago, Dominican Republic, to JFK, New York pursuant to seven air waybills. Defendant moved for partial summary judgment to dismiss the claims as to four of the seven air waybills and to dismiss in part with respect to one other. Defendant argued that the claims as to the waybills should be dismissed because the plaintiff failed to submit a timely written complaint as required by Article 31 of the Montreal Convention.

The court dealt with the five shipments in turn. With respect to three of the shipments, on arrival at JFK the plaintiff noted the Delivery Slip and Receipt as "damaged," "damaged by weather," and "cargo damaged." *Yoly Farmers Corp.*, 2015 WL 4546744, at *2.

A separate shipment had notations on the Delivery Shipment Receipt, "beans very hot" and "shown to Bobby Jaeger and Anderson USDA inspector." *Id*. at *1.

As to the fifth shipment, there were no notations on either the Delivery Slip or Receipt; however, plaintiff, in an affidavit by

one of its officers, recalled speaking to defendant's representative about the damage to the cargo carried under that waybill.

Plaintiff submitted cargo loss or damage claim forms; however, these were not submitted within the 14 days required by the Convention.

The court noted Article 31 of the Montreal Convention required a shipper to provide timely written notice regarding any damage to its cargo within 14 days of the cargo's arrival. If no complaint is made within that time, "no action shall lie against the carrier, save against a fraud on its part." *Id.* at 2015 WL 4546744, at *3.

The court found the notations on the delivery slips and receipts for three shipments which indicated that the cargo carried under these waybills was "damaged," provided the defendant with sufficient notice that it might be held liable for plaintiff's claims and gave defendant an opportunity to investigate the claims. *Id*. at *4.

As to the shipment of beans, the court noted the notation that the beans were "very hot" did not indicate that the goods were damaged. *Id*. at *6,

As to the final shipment, there was no dispute the plaintiff did not submit any written complaint with respect to it as required by Article 31(3).

Defendant's motion for partial summary judgment was granted in part (with respect to two shipments) and denied as to the others.

INSURED'S SHOES DON'T QUITE FIT SUBROGEE…

In re M/V MSC FLAMINIA, 107 F. Supp. 3d 313, 2015 AMC 1087 (S.D.N.Y. 2015).

In July 2012, a fire onboard the M/V MSC FLAMINIA occurred during its voyage from Louisiana to Germany. The owner and operator of the vessel filed a complaint for exoneration from or

limitation of liability and subsequently filed cross claims against one of the cargo claimants alleging that claimant produced, shipped, etc. a chemical that was responsible for the explosion and fire and all the resulting damage and losses.

In July 2014, that claimant filed cross claims against a European chemical company based in Germany and its North American affiliate based in New Jersey.

The German corporation moved to dismiss all claims against it arguing that the court lacked personal jurisdiction in that it did not have the requisite contacts with New York, nor did it consent to such jurisdiction or waive such defense, and that process was insufficient and service of process was improper.

The court considered the aspect of whether it had general jurisdiction under a "doing business" standard or under an agency theory. The court found that subjecting the defendant to jurisdiction in New York would not comport with due process. Plaintiff had not alleged that defendant's operations in New York were "so substantial and of such a nature as to render the corporation at home in that State" to make this one of the exceptional cases calling for jurisdiction. *In re M/V MSC FLAMINIA*, 107 F. Supp. 3d at 320, 2015 AMC at 1093.

The court also noted the defendant's annual New York sales from 2011 through 2014 amounted to less than 0.87% of its worldwide sales. Such minimal contacts with New York did not render defendant "at home" in that state.

Considering further discovery into the relationship between the two entities would not affect the ratio of defendant's sales in New York, plaintiff's request for jurisdictional discovery was denied.

The court then considered an argument that the motion to dismiss was untimely as it had been waived by failing to assert any Rule 12 jurisdictional defenses in the first responsive pleading and

by filing a claim in the Limitation Act. It was further asserted that jurisdictional defenses were not raised in a prior motion to dismiss.

Defendant alleged it did not voluntarily submit to jurisdiction because the responsive pleading and claim and motions upon which plaintiff relied were filed in its name by counsel for defendant's subrogated insurer without notifying or obtaining authorization for defendant.

The court noted the parties had stipulated that defendant should be substituted "as subrogee of BASF SE" in the pleadings and claims filed in the Limitation Action. *Id.* at 321, 2015 AMC at 1096. The stipulation made clear that the subrogated insurer was distinct from the insured defendant, and although a court may impute an insured's actions to the insurer when the insurer has paid the insured for a loss, it does not follow that the actions of an insurer can be imputed to the insured. Under the facts presented, the court considered it would be inequitable to find the subrogated insurer's appearance in the name of its insured constituted an appearance by that insured.

As to plaintiff's argument that the court had jurisdiction pursuant to Rule 4(k)(2), plaintiff had not certified that the defendant was not subject to jurisdiction in any other state. Indeed, the facts alleged suggested that personal jurisdiction might well exist elsewhere in the United States, such as in the State of Louisiana, given that defendant took delivery of the chemical at issue from an affiliate plant in Louisiana and arranged for transportation from Louisiana to Germany. Accordingly, the court found plaintiff had not alleged all of the elements required for the exercise of personal jurisdiction under Rule 4(k)(2).

Finally, plaintiff's request for jurisdictional discovery concerning contacts with the United States as a whole was denied. Although the district court has discretion to authorize jurisdictional discovery, the court considered discovery not warranted in this matter where the plaintiff had failed to make a prima facie showing of jurisdiction.

"ALL IS GOOD" IS ALL YOU NEED…

Moran Dry Bulk Carriers, a Division of Moran Towing Corp. v. Pacorini Logistics, LLC, No. 15 Civ. 3625 (AKH) (S.D.N.Y. July 13, 2015).

A petition to compel arbitration was brought with respect to a charterparty agreement allegedly entered into through a third-party chartering broker. The charterparty contained a clause providing that all disputes be resolved through a three-person panel under New York law.

In September of 2014, defendant's vice president and chief operating officer entered into negotiations with the chartering broker about chartering a vessel to ship frac sand from Louisiana to Texas. The chartering broker e-mailed to defendant a blank standard form charterparty agreement that contained an arbitration clause. The clause described the arbitration process in detail. On September 25, 2014, the chartering broker sent an e-mail along with a proposed charter stating various terms of the charter for review and confirmation by return e-mail. The e-mail specified the name of the barge, the year it was built, its capacity, the shipping rate, demurrage rate, minimum freight to be shipped, etc. It also incorporated by reference the terms of the form of charterparty previously provided. Approximately several hours after receiving the e-mail, charterer/defendant sent a reply stating, "Yes I approve and all is good."

In December, the chartering broker advised defendant via e-mail that the barge was at New Orleans and ready for loading. After defendant declined to follow through with the agreement, petitioner made an arbitration demand, on which defendant failed to follow through. A formal demand for submission to arbitration was made and each party appointed a member (the charterer doing so under protest) and the arbitrators jointly selected a third member to complete the panel. Subsequently counsel for defendant notified petitioner that it did not intend to proceed and planned to petition the court to enjoin the arbitration.

The court noted that charterer, through its vice president and chief operating officer, manifested assent by e-mail to the terms set forth by the chartering broker.

On the issue of completeness, the court found, "A charter is formed when the parties agree to its essential terms (citation omitted)". The terms, usually set in the first stage of negotiations, are together known as a 'fixture."

Defendant complained that the terms which were initially provided did not identify the ship's owner and that the shipping and demurrage rates quoted to it differed from the terms the chartering broker quoted to petitioner.

The court noted that the owner of the barge was readily discernable from the American Bureau of Shipping public records and, while demurrage and freight terms are important, courts are reluctant to strike down otherwise valid charter agreements in their absence. It further noted that, as charterer, the defendant had agreed to pay a higher rate than petitioner was willing to accept, and the fact that the broker might profit from the differential was no reason to release the defendant from its obligation.

As to the issue of "double-agency," defendant did not present any evidence that the chartering broker held itself out as a fiduciary of the defendant.

The court found the chartering broker had presented defendant with details of a proposed charterparty agreement, and when the defendant was satisfied with the terms, it gave the chartering broker authority to bind it.

The court granted the petition to compel arbitration.

HURRICANE SANDY – REASONABLE CARE FOUND…

Lord & Taylor LLC v. Zim Integrated Shipping Servs., Ltd., 108 F. Supp. 3d 197, 2015 AMC 1762 (S.D.N.Y. 2015).

On the evening of Monday, October 29, 2012, Hurricane Sandy made landfall in New Jersey causing significant damage along the east coast of the United States. As a result of flooding at a terminal located on Staten Island, N.Y., 211 cartons of ladies cardigans and sweaters were ruined by wetting damages. Although Hurricane Sandy was "figuratively an Act of God, the question before the court is whether Hurricane Sandy was 'an Act of God' that absolved the defendant from liability."

The court rendered a decision consisting of some 58 pages which included 25 pages of findings of facts covering the terminal, terminal operations, weather advisories, relevant weather forecasts and preparation made by the terminal prior to Hurricane Sandy.

The court stated "[t]o prevail on an Act of God defense under COGSA, a carrier must show that 'the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier or bailee.'" *Zim Integrated Shipping Servs.*, 108 F. Supp. 3d at 214, 2015 AMC at 1788. (Citation omitted)

The court then dealt with what the terminal knew about Sandy prior to the storm making landfall on the evening of October 29, the severity of Sandy and whether the terminal was negligent in its preparation or whether nothing could have been done.

The court found that Sandy was unusually destructive and relevant forecasts predicting such did not arrive until the weekend when nothing more could have been done. Neither the terminal nor the ocean carrier were negligent in an attempt to prepare for Sandy. It also considered various allegations on behalf of plaintiff of what might have been done by the terminal, noting that under the time frame of the announcements of Sandy's storm surge and the adjusted forecasts, the terminal had no reasonable or practical way to prevent the result of Sandy's storm surge.

The court found that ". . . Hurricane Sandy was an Act of God, that its severity – and in particular – its storm surge, were not reasonably foreseeable, and that no exercise of reasonable care could have prevented the loss." *Id*. at 231, 2015 AMC at 1816.

[Editors' note: Reading of the decision itself is suggested better to appreciate the details that the court considered in its findings, consideration of testimony and evaluations of arguments presented.]

HURRICANE SANDY - REASONABLE CARE NOT FOUND…

TGI Office Automation v. National Electronic Transit Corporation, No. 13-CV-3404 (ARR) (VMS) (E.D.N.Y. Sep. 11, 2015).

Hurricane Sandy damage was also considered by the United States District Court for the Eastern District of New York. That case involved severe flooding damage in New Jersey and particularly to copy machines when defendant's warehouse was flooded by Sandy's storm surge.

The court found defendant did not exercise reasonable care in preparing for Sandy's impact and, thus, was liable for plaintiff's loss.

In a 51-page decision, Judge Ross considered the aspect of the defendant's premises in the Meadowlands of New Jersey, the nature of the warehouse, its description and its operations; the defendant's preparations for Sandy; damage to the copy machines and the warehouse; the weather forecasts; the history of flooding at the warehouse; daily forecasts from the 22nd of October through October 29th (the day of the storm surge), as well as post-storm assessments.

The court considered the defendant to have the burden of proving that there was an Act of God and no contributing negligence (citing cases). While both parties agreed that Sandy was an Act of God (a catastrophic storm both unusual in nature and severe in

impact), plaintiff alleged the warehouse could reasonably have prevented flood water from destroying the machines. This allegation turned on two questions: (1) whether the storm surge was foreseeable to a reasonable warehouseman in the defendant's position; and (2) whether the defendant's preparations for this storm were reasonable, given the available information and circumstances at that time.

The court went on to consider the foreseeability of Sandy; the severity of the storm surge; the location of storm surge forecasts; the stages of foreseeability; and went on to consider the reasonableness of the warehouse's actions; its early planning and preparation; the design of the building and the precautions taken on the morning of September 29th.

The court found the warehouse had not sustained its burden of demonstrating there were no reasonable measures that it could have taken to prevent or limit the destruction of the machines involved. The court noted the warehouse operated "business as usual" on early Monday morning, particularly in light of its awareness by Sunday evening that a heavy storm surge would affect the area, and also noted that defendant's owner had moved his personal property to another warehouse a few days before Sandy struck.

The court found defendant had inadequately planned and prepared for Sandy's landfall, despite early and consistent forecasts that the area would flood and also by conducting business as usual on Monday morning, failing to utilize rack space, trucks and trailers, and its other warehouse to remove machines from the warehouse floor.

The court found the warehouse had failed to sustain its burden of proof with respect to the Act of God defense and, thus, was liable for the loss.

The court also noted the *Lord & Taylor* decision (summarized *supra*) and set forth distinguishing factors between

what was involved in that case and the case before it. (See particularly footnote 25 at page 47 of the decision.)

[Editors' note: As with the preceding summary, a reading of the detailed decision is recommended. The decision is marked "Not for Electronic or Print Publication."]

BREACH OF SECURITY SCUTTLES LIMITATION…

Royal & Sun All. Ins., PLC v. E.C.M. Transp., Inc., No. 14 CIV. 3770 JFK, 2015 WL 5098119 (S.D.N.Y. Aug. 31, 2015).

A shipment of computer parts was stolen while being carried on a truck owned by defendant. The shipment was pursuant to a 2007 Service Agreement with respect to the door-to-door carriage of product, including a provision that the trucker's damages were limited to a maximum of $250,000. Another provision of the agreement stated that "[b]reach of security…" would be "subject to the full replacement value of the product." *E.C.M. Transp., Inc*., 2015 WL 5098119, at *1.

A subsequent addendum to the agreement contained a provision that the trucker would "not be liable for losses in excess of $100,000." *Id*. at *2.

The truck was brought to a yard where it was kept over the weekend. During that time, the gates to the yard were left open and the car and trailer were left unattended by the driver. The shipment was subsequently stolen.

The court considered the matter covered by the Carmack Amendment, which supplies "the sole remedy for damages" where a shipper seeks to recover against a carrier for loss of goods during an interstate shipment. *Id.* at *3.

The court found little question that the plaintiff's claim was valid under the Carmack Amendment; having shown: (1) the shipment was delivered to the carrier in good condition; (2) the

shipment was lost or arrived in damaged condition; and (3) that the shipper was harmed as a result.

As to quantum, the trucker argued its liability was limited to $100,000 under the terms of a 2013 Released Value Provision subsequently agreed to as amending the 2007 Service Agreement.

The court found a plain reading of the subsequent 2013 Schedule as a whole required that it be read as an addendum to the initial Service Agreement. The court also considered that the Amendment met the requirements of the Carmack Amendment under the "released value" doctrine (reducing the initial $250,000 limitation to the $100,000 limitation set out in the 2013 Schedule as a result of informed negotiations between the plaintiff and defendant and "reflected an actual choice by [plaintiff]" to reduce its shipping costs. *Id.* at *6. However, the court went on to find the trucker's right to limit liability was void under the "material deviation" doctrine, noting the provision referring to "breach of security" as calling for full reimbursement. *Id*. at *8.

The record indicated that the trucker failed to follow its own security guidelines in carrying the Shipment; its own Cargo Security Procedures instructed drivers generally "not [to] leave your vehicle unattended" and always to park in a "secure area." *Id*. In spite of this, the gate of the yard was left open and the car and trailer were left unattended over the weekend. The yard had no security guards and as such could not be considered "secure" under any reasonable interpretation of the term.

The court found the trucker breached its security obligations and these violations constituted material deviations from the agreed-upon terms of the contract of carriage. Thus, plaintiffs were entitled to recover the full replacement value of the shipment.

The court went on to award pre-judgment interest and denied plaintiff's request to recover survey costs, noting the Carmack Amendment did not provide for recovery of expenses.

TWELVE THOUSAND THREE HUNDRED DOLLAR PER MILE DEVIATION…

GIC Servs., LLC v. Freightplus (USA), Inc., 120 F. Supp. 3d 572 (E.D. La. 2015)

The plaintiff made arrangements with defendant for the shipment of a tug from Houston, Texas to Lagos, Nigeria. The defendant, whom the court found acting as an NVOCC, made arrangements with the actual carrier to perform the voyage. The NVOCC defendant issued a bill of lading representing that the tugboat REBEL had been shipped onboard from Houston, Texas on December 26 for Lagos and that freight had been prepaid. The bill of lading was issued clean."

Contrary to that bill of lading, the actual carrier issued a bill of lading indicating a sailing date of December 27, listing Warri as the port of discharge and was not "clean" (containing some incidental notations). That bill of lading also represented that freight had been prepaid, and in addition, the actual carrier generated a manifest that listed Warri as the port of discharge.

The difference in ports of discharge (some 151.29 nautical miles apart) was noted after sailing and efforts were made to change the port of discharge and have the tug taken off at Lagos. Such efforts as were made to change the port of discharge were of no effect. The vessel went on to Warri where the REBEL was discharged and held at that port.

Plaintiff sued the NVOCC defendant and it sought indemnity from the actual carrier. The court found a deviation by the NVOCC defendant, having issued a bill of lading indicating Lagos to be the port of discharge; however, the tugboat was actually carried beyond that port and discharged at the port of Warri.

The NVOCC defendant asserted that liability, if any, would be limited to $500 and also asserted a claim for indemnity against the actual carrier. The actual carrier counterclaimed against the NVOCC and the REBEL (*in rem*) claiming unpaid freight charges.

Although freight had been paid to the NVOCC defendant, the actual carrier had not been paid.

The court found COGSA applied and that the NVOCC defendant was not entitled to limitation of $500 per package, having failed to deliver the goods at the port named in the bill of lading, but in fact carrying them farther to another port. This constituted a deviation and the burden of proof rested upon the defendant to show that its actions were reasonable. The court found the circumstances indicated the deviation was unreasonable.

The NVOCC also issued a letter of indemnity to the plaintiff's bank representing that it had issued an "original House bill of Lading" for clearing in Lagos and that this was the only original bill of lading to be issued against the shipment.

"Thus, the letter of indemnity, as well as the erroneous bill of lading, render [defendant] liable for the damages arising out of the discrepancies between [its] bill of lading and the bill issued by [the actual carrier]." (Brackets supplied)

As to the NVOCC's claim against the actual carrier, the court noted the actual carrier also should have been aware of or alerted to the discrepancies between the two bills of lading and that the tug should have been discharged at Lagos instead of Warri. Its agent had failed to take steps to insure proper delivery at Lagos and thus, defendant was entitled to claim indemnity from the actual carrier for its negligence.

The court found that the NVOCC defendant was liable to plaintiff for $1,860,985 as well as pre-judgment interest.

It further found that the NVOCC defendant was entitled to be indemnified for 30% of its liability, being 70% at fault due to its failure to verify the information on its bill of lading and issuing an indemnity letter that contained inaccurate statements.

The court found the NVOCC defendant entitled to collect 30% of its attorneys' fees spent in defending against the claim.

However, the cost of prosecuting the indemnity claim was not recoverable.

It also found the actual carrier entitled to recover unpaid freight in the amount of $70,309.12 from the NVOCC defendant.

[Editors' note: After this newsletter was written, the court modified its opinion to vacate the award of 30% of the NVOCC's attorneys' fees on the grounds that one joint tortfeasor should not collect attorney fees from another joint tortfeasor. Each joint tortfeasor expended attorneys' fees to defend itself. *GIC Services, LLC v. Freightplus (USA), Inc.,* No. Civ. A. 13-6781 (E.D. La. Sept. 25, 2015)**]**

DOWN SOUTH (FLORIDA): GO TO TOKYO…

N. Am. Auto Sales, LLC v. Nippon Yusen Kaisha, 2015 AMC 2582, 2015 WL 5521919 (M.D. Fla. Sept. 16, 2015).

Two shipments of Toyota Camrys were shipped to a consignee in Aqaba, Jordan. They arrived five days after the expiration of a permit allowing entry.

Plaintiff sued for the loss of the cars and defendant carrier moved to dismiss on the basis of a forum-selection clause in the bill of lading calling for Tokyo venue.

The court noted forum-selection clauses are presumptively valid and enforceable "unless the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances." *N. Am. Auto Sales, LLC*, 2015 AMC at 2583. (Citation omitted)

It was acknowledged that the forum-selection clause in this case was mandatory and presumptively valid. As to an argument asserted that the clause might lessen the carrier's liability below what COGSA guarantees, the court rejected same; further noting that the Supreme Court has enforced a forum-selection clause calling for Tokyo jurisdiction and that numerous courts have

enforced similar clauses. It distinguished a case referred to by the plaintiff and concluded that plaintiff had failed to show the clause violated COGSA. *Id*. at 2584-85.

The court held the clause applicable to a second count of the complaint (conversion) as the allegations contained in that count incorporated the allegations contained in the previous count and it was otherwise clear that the two claims were sufficiently related.

The court dismissed the complaint on condition each defendant agree to accept service of process in Japan and submit to that jurisdiction; each defendant agree to treat re-filing of the action in Japan as though it had been filed as of the date filed in the current action; and each defendant agree to be bound to any final judgment after appeal, if applicable, that the Tokyo court might enter against them. *Id*. at 2585-86.

UP NORTH (PENNSYLVANIA): GO TO TOKYO…

Amazon Produce Network, LLC v. NYK Line, 2015 AMC 2574, 2015 WL 5568386 (E.D. Pa. Sept. 21, 2015).

Three actions were brought with respect to alleged damage to shipments of mangoes shipped from Nicaragua and Costa Rica to Los Angeles, California.

Defendant carrier moved to dismiss all three cases on the basis of a forum-selection clause providing for resolution in a Japanese court under Japanese law.

Plaintiff contended the application of Japanese law would contravene COGSA and that the motion was procedurally flawed because it had sought dismissal under Rule 12(b)(3).

The court noted the Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S.Ct. 563 (2013), as delineating "the proper procedural mechanism for enforcing a forum-selection clause in a contract." *Amazon Produce Network, LLC*, 2015 AMC at 2575.

"When venue is proper and the forum-selection clause calls for dispute resolution in a state or foreign tribunal, . . . the defendant must seek dismissal under the doctrine of forum non conveniens." *Id*. at 2576. The court noted defendant stated in its supporting brief that the motion was based on Rule 12(b)(3), but there was no specific reference in the motion itself, and there was no specific reference to *forum non conveniens*. The defendant simply made the argument that the forum-selection clause rendered the venue improper. *Id.* at 2576-77.

On the record before it, the court found defendant, in its brief, had relied on cases where *forum non conveniens* formed the basis for those courts' decisions. It concluded that the defendant had done enough to advocate under the appropriate procedural vehicle for its motion to dismiss. *Id*. at 2577.

Plaintiff argued that a court in Japan would be subject to the Hague-Visby Rules to the exclusion of COGSA and that any recovery in that venue would result in a figure ($483.18) less than the $500 maximum incorporated into COGSA.

Plaintiff's calculations were based upon a rate of exchange from U.S. dollars to SDRs; however, the proper calculation would be the conversion of SDRs into dollars as the Japanese court would be rendering damages in SDRs. Using this ratio, the product would result in a recovery exceeding a $500 package limitation ($919.84). Thus, any award in Japan would be worth more, not less, than would be awarded in dollars under United States law.

In sum, the court found there would be no lessening of liability and, thus, the strong public policy embodied in COGSA was not undermined. As plaintiff did not meet its burden of showing "'that public interest factors overwhelmingly disfavor[ed]' dispute resolution in Japan pursuant to Japanese law," the clauses involved were valid and enforceable. *Id.* at 2581. The cases were dismissed.

COMMITTEE ON FISHERIES

Chair: Mark T. Coberly
Editor: Terence G. Kenneally

FISHERIES CASE BRIEFS[1]

Fall 2015

Li-Shou v. United States, 777 F.3d 175, 2015 AMC 539 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 139 (2015).

Taiwanese widow brought an action against the United States for damages arising from the killing of her husband and the sinking of his fishing vessel during a North Atlantic Treaty Organization counter-piracy mission. The district court granted the government's motion to dismiss and the plaintiff appealed. The Fourth Circuit upheld the lower court holding that plaintiff's claims presented non-justiciable political questions, that the Public Vessels Act included a discretionary function exception, and that the discretionary function exception to the government's waiver of sovereign immunity applied to the claims.

Johnson v. Williams Party Boats, Inc., No. 3:14-CV-123, 2015 WL 1143178, 2015 U.S. Dist. LEXIS 30817 (S.D. Tex. March 12, 2015).

> The Texas Gulf Coast is blessed with warm waters filled with plentiful sportfish, easily accessible by chartered fishing expeditions. On an idyllic Texas day, a passenger on such an excursion can enjoy boundless views of the Gulf of Mexico, the hot sun spilling on to the boat's deck, the refreshing sea breeze, and the occasional briny taste of sea spray. Sometimes, however, the breeze is a little

[1] Prepared by Lara D. Merrigan, Young Lawyers Liaison, and Edwin Barnes of Thomas Quinn & Krieger, LLP

> stiffer and the seas a little choppier. One such day led to this lawsuit.

2015 U.S. Dist. LEXIS 30817 at *1.

Plaintiff and thirty-seven other passengers embarked on a 36-hour fishing trip with Williams Party Boats aboard the CAPT JOHN out of Galveston. The CAPT JOHN is authorized by the United States Coast Guard to operate with up to 106 passengers, 200 miles out to sea, and in seas of up to eight and a half feet. Although the weather report was relatively benign with three and a half to five foot seas, plaintiff contends the seas were choppy and many passengers retreated to bunks with sea sickness. Plaintiff gave up his bunk to another passenger, and decided to lay down on a bench affixed to the upper deck of the CAPT JOHN when a large wave caused him to be thrown from the bench and injure his left shoulder. The captain returned to port after the incident. Plaintiff filed a suit for negligence under the general maritime law for travelling in rough seas, and the defendants removed the claim to federal court.

Plaintiff did not identify an expert until five days after the deadline for exchange of reports, and did not provide a report. Defendants moved to strike the expert and for summary judgment. In the Fifth Circuit, when determining whether to exclude expert testimony that has been improperly designated, the court considers four factors: (1) the explanation of the failure to identify; (2) the importance of the testimony; (3) potential prejudice; and (4) the availability of a continuance to cure the prejudice. Citing *Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007). Although the plaintiff clearly was late and inexcusably so, the court focused on the fact that determining water conditions and the captain's choice was highly technical and required expert testimony, and that by granting a continuance and allowing the defendants to prepare a rebuttal report cured any prejudice. Accordingly, the court denied both of the defendants' motions and continued the trial.

Shuman v. Lauren Kim, Inc., No. 14-251(RBK/JS), 2015 WL 1472003, 2015 U.S. Dist. LEXIS 41495 (D. N.J. March 30, 2015).

Plaintiff filed claims for negligence and unseaworthiness, maintenance and cure, and punitive damages alleging he suffered an injury while working aboard the commercial F/V MISS LAURIE LOUISE. Plaintiff also sought to pierce the corporate veil, which claim defendants moved to dismiss. Determining whether a pleading states a claim is evaluated by: (1) noting the elements; (2) identifying the allegations that are not entitled to an assumption of truth; and (3) considering whether the well-pled allegation support the entitlement to relief. Citing *Santiago v. Warminster Twp*., 629 F.3d 121, 130 (3d Cir. 2010). The court granted the motion because the only facts pled were that the defendants created the entities to avoid legal obligations and shield assets, which the court noted was the purpose of corporations and not illegal, and the claimant failed to allege any facts that suggested they avoided legal obligations and shielded assets for a fraudulent purpose.

United States v. Bengis, 783 F.3d 407, 2015 AMC 1181 (2d. Cir. 2015).

Bengis and Noll pleaded guilty to conspiracy to commit smuggling and violate the Lacey Act, which prohibits trade in illegally taken fish and wildlife. The district court entered a restitution order directing Bengis and Noll to pay South Africa $22,446,720. They appealed the order. The Second Circuit considered whether (1) the appeal should be dismissed; (2) the restitution order violated the Sixth Amendment; and (3) Bengis was solely responsible. The illegal fishing took place from 1987 to 2001 and involved the taking of rock lobster from South Africa to be sold in the United States. The Second Circuit upheld the lower court in all respects except for the award against Bengis, who had only joined the conspiracy in 1999. The court remanded for a determination of the extent to which he knew of the past operations of the conspiracy when he joined.

Mycko v. M/Y AMARULA SUN, Civ. Case No. 14-62215-CIV, 2015 WL 2384060, 2015 U.S. Dist. LEXIS 65375 (S.D. Fla. May 19, 2015).

Plaintiff seamen filed suit, and moved for summary judgment for unpaid wages and related penalties after the master of the M/Y AMARULA SUN terminated them without the notice required by their contracts and for the penalty in 46 USC § 10313(g) for failure timely to remit a final paycheck. The court denied both motions for summary decision. Plaintiffs are not entitled to notice if, as the defendant alleged, they were terminated for cause. Finally, the judge noted that 46 U.S.C. § 10313(h) specifically excludes fishing or whaling vessels or yachts, and therefore the defendant's contention that it was a yacht defeated the motion for summary judgment.

Seafarers, Inc. v. King Ocean Services Ltd., No. 15-Civ-20834, 2015 AMC 1450, 2015 WL 3455331, 2015 U.S. Dist. LEXIS 69641 (S.D. Fla. May 29, 2015).

This decision denied a motion for remand and dismissed the case without prejudice concerning a cause of action arising under the Carriage of Goods by Sea Act ("COGSA") and the Harter Act. The plaintiff, a producer and importer of fish, filed suit in state court in Florida against multiple international common carriers including three under the King Ocean corporate umbrella and one inland carrier, Martainer, seeking to recover attorney fees and a $50,000 liquated damages payment Seafarers made to Customs and Border Patrol. ("CBP").

Seafarers imported 27,880 pound of gold snapper fillets, which were rejected by the U.S. Food and Drug Administrations. Seafarers hired the defendants to export the snappers to Bogota, Colombia. CBP, however demanded re-delivery of the snappers for re-inspection. Disregarding the demand, Martainer and King Ocean loaded the snappers and exported them to Colombia. CBP levied a $50,000 liquidated damages on Seafarers, which Seafarers sought to recover in state

court. The defendants removed to federal court, and Seafarers moved for remand.

The court held that COGSA and the Harter Act applies to all contracts for carriage of goods by sea to or from open ports of the United States in foreign trade, regardless of whether the goods themselves or damaged or lost, and including customs penalties. Accordingly, the motion for remand was denied, and the case was dismissed without prejudice to allow the plaintiff to state proper complaints.

Willie R. Etheridge Seafood Co. v. Pritzker, No. 2:14-CV-73-BO, 2015 WL 4425659, 2015 U.S. Dist. LEXIS 93281(E.D.N.C. July 16, 2015).

Plaintiffs are eighteen commercial fishermen and companies operating out of North Carolina who contested Amendment 7 to the Consolidated Atlantic Migratory Species Fishery Management Plan on December 2, 2014. Plaintiffs are pelagic fisherman, but tuna may not be targeted with pelagic longlines – thus they are required to have bluefin tuna permits because they are a common bycatch. Amendment 7 sought to minimize bluefin tuna bycatch, and plaintiffs allege that it threatens the economic viability of their business as the swordfish catch will lower and regulatory compliance through monitoring will increase.

The court dismissed the violation of the Administrative Procedure Act ("APA") complaint because no part of the APA creates a substantive right. The court dismissed the fifth amended complaint as a fishing permit is not a legitimate property interest. The court dismissed the complaint for failing to complete a Regulatory Flexibility Act review. Finally, the court dismissed the National Environmental Protection Act ("NEPA") complaint because NEPA was designed to protect the environment, not the economic interest of those adversely affected by agency decisions.

Beech v. F/V WISHBONE, Civ. Case No. 14-0241-WS-B, 2015 WL 4458839, U.S. Dist. LEXIS 94569 (S.D. Ala. July 21, 2015).

This decision concerned three post-judgments motions: (1) Skipper's Landing Inc.'s motion for discharge of a vessel release bond; (2) Skipper's motion to tax costs; and (3) plaintiffs' motion to alter or amend judgment. First, the court denied plaintiffs' motion on procedural grounds under Federal Rule of Civil Procedure 59(e) as the plaintiffs had failed to present new evidence. However, it noted that the motion also failed substantively, because the applicable test for a "stranger of the vessel" theory was not mechanical, and no one aspect of the relationship was determinative. And finally, it noted the motion was pointless in any event because the plaintiffs did nothing to address the fact that the judge had ruled against them on laches.

In regard to the motion to tax costs, the plaintiffs had the vessel arrested *in rem*, and Skipper's was required to post bond of $108,000, costing it approximately $2,160. It sought to recover under 28 U.S.C. § 1919, which provides payment of just costs where an action is dismissed for want of jurisdiction. In denying the motion, the court held that the finding respecting the maritime liens did not amount to a determination that jurisdiction was lacking and noted that section 1920 plainly did not allow taxing of costs for bond premiums.

Finally, unopposed, the court ordered the discharge of the vessel's release bond.

United States v. Daniels, Civ. Case No 4:14-CR-11-F-1, 2015 WL 4509995, 2015 U.S. Dist. LEXIS 96829 (E.D.N.C. July 24, 2015), *appeal docketed,* Case No. 15-4501, (4th Cir. Aug. 31, 2015).

This order concerned pre-trial motions filed by the defendant Bryan Daniels. Daniels, a commercial fisherman, held a federal vessel operator permit from National Oceanic and Atmospheric Administration ("NOAA") since 1996. In 2009, Daniels was the captain of the JOYCE D., a commercial stern trawler fishing vessel. North Carolina authorized the fishing of striped bass in

inland and ocean waters within three nautical miles from shore. The vessel monitoring system tracking data revealed a trip netting 1,086 pounds of striped bass on a two-day trip in January 2009; a trip netting 2,159 pounds of striped bass 6.5 miles from shore; and a trip netting 5,158 pounds of striped bass 8.8 miles offshore – all of which are in the Exclusive Economic Zone ("EEZ"), more than three miles from shore, and in violation of federal law.

Daniels moved to dismiss certain indictments on the grounds that his actions were not in violation of the Lacey Act and that the applicable statutes were unconstitutional on the grounds of vagueness. First the court noted the indictment rested at the nexus of the Lacy Act, the Magnuson-Stevens Act, and the Atlantic Striped Bass Conservation Act ("ASBCA"). The Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase and f18988ish or wildlife or plant taken, possessed, transported or sold in violation of any law, treaty, or regulation of the U.S. or in violation of any Indian tribal law. In particular, Daniels was charged with taking Atlantic striped bass in the EEZ under 50 CFR § 697.9(b). However, the Lacey Act does not apply in any case where the activity is regulated by a fishery management plan in effect under the Magnuson-Stevens Act. Here, the court held that the Lacey Act exception applied through the ASBCA Fishery Management Plain, which was recognized in the Magnuson-Stevens Act.

The other aspects of the pretrial motions concerned the notice of intent to use Federal Rule of Evidence 404(b), a motion to sequester government witnesses, a motion to disclose Brady/Giglio materials, and a motion for disclosure of government exhibits.

Tran v. Abdon Callais Offshore, *LLC*, 120 F. Supp. 3d 554 (E.D.La. July 27, 2015).

This appeal challenged the decision arising out of a bench trial regarding the collision between metal and fiberglass vessels. The parties included the F/V STAR OCEAN, the M/V ST. JOSEPH THE WORKER, the salvager Tran & Peter LLC, the captain and the deckhand of the F/V STAR OCEAN claiming for

personal injury damages, the defendant who sought to recover the cost of the spill response incurred in the aftermath, an65d intervenor Tom's Marin & Salvage, LLC for its contract with Tran & Peter LLC. The court held: (1) the metal and fiberglass vessels were 75% and 25% at fault respectively; and (2) the fiberglass vessel owner was not entitled to pre-judgment interest.

Yang v. Majestic Blue Mountain Fisheries, LLC, No. 13-00015, 2015 WL 5003606, 2015 U.S. Dist. LEXIS 112040 (D. Guam Aug. 24, 2015).

This case concerns a wrongful death action in which plaintiffs seek damages for the death of Chang Cheol Yang while he was onboard the F/V MAJESTIC BLUE, which sank in the West Pacific on June 14, 2010.

Dongwon Industries Co., Ltd., is a Korean corporation that sold the vessel to Majestic Blue, a Delaware corporation, in April 2008 for $10. In May 2008, they entered into a contract whereby Dongwon was to arrange and supervise dry-docking and repairs, maintain the vessel, supply equipment and parts, and supply a crew to man the vessel. In March 2010, the MAJESTIC BLUE arrived in China for its annual dry-docking and set out May 7, 2010, to travel to Guam for further repairs on May 13, 2010. On May 21, 2010, it again set sail on a tuna fishing expedition with 23 crew and one observer, and sank on June 14, 2010. The crew and the observer abandoned ship, but the captain and Yang went down with it. On December 9, 2010, Majestic Blue filed in district court for exoneration and limitation of liability.

The magistrate concluded Majestic Blue: (1) knew the vessel was unseaworthy; (2) knew specifically of the unseaworthy conditions manifesting at the rudderstock and the excessive and constant leaks; (3) knew of the incompetency of the crew which lacked experience, training, a common language, and basic emergency skills; and (4) knew the captain had no real authority on the vessel, and therefore was not eligible for limitation. Meanwhile, the plaintiffs filed suit under the Jones Act, general maritime law,

and the Death on the High Seas Act. After consolidation, the magistrate recommended the court compel arbitration.

The court found that despite the decedent having signed a contract in English, which he did not speak, there was a contract and meeting of the minds. Next, it concluded the prospective-waiver doctrine did not apply as South Korea allowed for mediation and recovery. Thus, the only issue remaining concerned whether Dongwon, a non-signatory to the decedent's contract with Majestic Blue, could enforce the arbitration agreement.

In the Ninth Circuit, a non-signatory to an arbitration agreement may compel arbitration if the relevant state contract law so permits. See *Kramer v. Toyota Motor Corp*., 705 F.3d 1122, 1128 (9th Cir. 2013). Although there is no Guam case law on the point, the Supreme Court of Guam has recognized that it draws on California Civil Procedure law, which permits a non-signatory to enforce an arbitration agreement only when equitable estoppel applies. As the claims did not rely on a contractual relation, the court denied Dongwon's motion to compel.

However, Majestic Blue, with whom the decedent was a signatory, joined Dongwon's motion to compel arbitration. As Majestic Blue had filed the limitation action, plaintiff opposed the motion to arbitrate on the grounds that the limitation action was inconsistent with its right to arbitrate and on the grounds that they had suffered prejudice because defendants had gained unfair access to discovery that, while available in the limitation action, would not be available to plaintiff in the South Korean arbitration. The court concluded that, although South Korea does not permit interrogatories, the information was discoverable through other means in South Korea. Accordingly, the court granted Majestic Blue's motion to compel arbitration.

Oceana, Inc. v. Pritzker, Civ. Case No. 12-0041, 2015 WL 5138389, 2015 U.S. Dist. LEXIS 115039 (D. D.C. Aug. 31, 2015).

Oceana, Inc., an environmental group, filed suit against the National Marine Fisheries Services ("NMFS") under the

Endangered Species Act challenging the agency's biological opinion ("BiOp") that the combined operation of seven fisheries (the Northeast multispecies, the Monkfish, the Spiny Dogfish, the Atlantic Bluefish, the Northeast Skate Complex, the Mackerel, Quid, and Butterfish, and the Summer Flounder, Scup, and Black Seas Bass Fisheries) was not likely to jeopardize the continued existence of a population of loggerhead sea turtles. Both parties moved for summary judgment. The fisheries employ various methods that can cause harm to loggerheads including sink gillnets and bottom otter trawls. Gillnets are particularly suspect in that in historical times they were commonly used in the sea turtle fishery industry for their effectiveness as catching sea turtles.

The first argument the court considered was the NMFS Article III argument that Oceana lacked standing to sue on behalf of its members, which requires: (1) the members to have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted not the relief requested requires the participation of the individual members. The court rejected the NMFS argument and found the Oceana members, some of who actually study loggerheads, satisfied the requirements. Second, the court disposed of Oceana's argument that the NMFS failed to take account of cumulative effects and aggregate effects. The court rejected this argument, labelling the objection as myopic. Third, the court rejected Oceana's argument that the NMFS failed to account for recovery by focusing on prospects for survival. Fourth, the court rejected the argument that a ten-year time period for the BiOp was arbitrary and capricious, distinguishing the case from a Ninth Circuit case that found five years to be arbitrary and capricious. See *Wild Fish Conservancy v. Salazar*, 628 F.2d 513, 522-25 (9th Cir. 2010). Fifth, the court rejected the argument that the NMFS had failed to take into account climate change effects, noting that just because the agency concluded it was unable fully to evaluate climate change did not mean that it did not consider the issue.

Finally, the court considered Oceana's challenge regarding the statistical modelling and the monitoring of incidental takes. The NMFS estimated that 269 will be taken from gillnets of which 167

will be lethal takes, and 213 will be taken from bottom trawl gear, of which 71 will be lethal takes. The court agreed that the ITS failed to address how the NMFS would monitor whether the take estimate were accurate or whether they were exceeded – i.e. whether the modelling was accurate. Accordingly, the court remanded to the NMFS to provide an explanation of the sufficiency and operation of its monitoring mechanisms, and noted that it would not vacate the BiOp.

Oceana Inc. v. Pritzker, Civ. Case No. 08-1881(PLF), 2015 WL 5184605, 2015 U.S. Dist. LEXIS 118197 (D. D.C. Sept. 4, 2015).

This case concerned a biological opinion issued by the National Marine Fisheries Service ("NMFS") in which the NMFS determined the operation of the Atlantic Sea Scallop Fishery would not jeopardize the continued existence of the Northwest Atlantic Distinct Population Segment of loggerhead sea turtles. Previously, the court had denied various motions by NMFS, plaintiff Oceana, and intervenor Fisheries Survival Fund, and directed the NMFS to explain its methods for monitoring interactions between loggerheads and fishing gear. After NMFS completed its review, Oceana argued that the NMFS methodology was arbitrary, capricious and in violation of the Administrative Procedure Act necessitating a second remand. NMFS moved to strike an expert declaration in support of the motion for second remand.

More specifically, the issue concerned a scatterplot that purported to show a strong positive linear relationship between two variables: the number of hours that vessels are out at sea using dredge fishing gear, and the number of loggerhead sea turtles struck by the gear – 252,323 dredge hours equating to 161 loggerhead takes. Oceana's expert contended that the NMFS' methodology was flawed, and NMFS moved to strike the expert's report as outside of the administrative record.

The judge noted there were four circumstances that permitted the court to resort to extra-record evidence in the D.C. Circuit: the agency: (1) acted in bad faith in reaching its decision, (2) engaged in improper behavior in reaching its decision, (3) failed

to examine all relevant factors, or (4) failed adequately to explain its grounds for decision. The court held that the NMFS failed adequately to explain the grounds for its conclusion that a strong positive linear relationship exist between dredge hours and loggerhead takes, and denied the motion to strike, noting the expert's declaration was instructive in respect to the sufficiency of the statistical explanation of the relationship between two variables.

Accordingly, the court instructed NMFS to file a response and permitted it to obtain its own statistical expert.

Marilley v. Bonham, 802 F.3d 958 (9th Cir. 2015), *reh'g en banc granted*, No. 13017358, 2016 WL 762018, 2016 U.S. App. LEXIS 3490 (9th Cir. Feb. 26 2016).

This case concerned a class action brought by non-resident commercial fishers against the Director of the California Department of Fish and Game, which had imposed higher fees on the non-residents than local fishermen, and which the class alleged violated the Privileges and Immunities Clause. The district court granted summary judgment in favor of the class and the Department appealed. The Ninth Circuit upheld the lower court and found: (1) non-resident fishing activity is sufficiently basic to the livelihood of the nation as to fall within the purview of the clause and that (2) California had no substantial reason to discriminate.

In doing so, the Ninth Circuit explained the Privileges and Immunity analysis, considering first, whether the challenged statute directly burdens a protected activity (commercial fishing fees directly affects commercial fishing) and second, whether the State has substantial reasons to justify the discrimination and whether the regulation bears a close relation to the reasons (the fees charged, while reasonable, were not simply higher than what residents paid, but wholly new, and therefore not closely related to "taxes which only residents pay.").

The Ninth Circuit held California's differential commercial fishing license fees, Cal. Fish & Game Code §§ 7852, 7881, 8550.5, and 8260.6, violate the Privileges and Immunities Clause. Charging

non-residents two to three times the amount charged to residents, the statute plainly burdened non-residents' right to pursue a common calling, commercial fishing, and the State failed to carry its burden to show that the discrimination bore a close relation to a resident's share of the State's expenditures.

Sanders v. Cambrian Consultants Am., Inc., Civ. Case No. H-15-680, 2015 WL 5554639, 2015 U.S. Dist. LEXIS 125611(S.D. Tex. Sept. 21, 2015).

Plaintiff, Sanders, filed suit in Texas against various defendants alleging a sexual assault by the captain of the seismic vessel M/V GECO TAU and the case was removed to federal court. Plaintiff moved for remand arguing the state court had jurisdiction over her claim because of the Savings to Suitors clause, 28 USC § 1333. Defendants argued that Sanders was asserting a general maritime claim under 28 USC § 1441(a) and that she was not a seaman as a matter of law because she was a marine mammal observer.

The issue concerned the standard for determining whether the Jones Act claim was fraudulently pled for the purposes of avoiding removal and whether the Fifth Circuit's decision in *Ryan v. Hercules Offshore, Inc.*, 945 F.Supp.2d 772 (S.D. Tex. 2013) was still good law. A defendant wishing to remove a Jones Act claim to federal court must prove that the allegations of the complaint were fraudulently made, and any doubts should be resolved in favor of the plaintiff. The court pierced the pleading and relied on *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993), and *Belcher v. Sundad, Inc.*, Civil No. 07-356 (HO) 2008 WL 2937358, 2008 U.S. Dist. LEXIS 56607 (E.D.La. Aug. 1, 2007), for the propositions that federally-required marine observers are generally not seaman. It further noted that when it recodified Title 46 in 2006, Congress removed a scientific personnel exclusion from Oceanographic Research Vessels Act ("ORVA") on the basis that the definition of "seaman" already excluded scientific personnel, and held that the plaintiff fraudulently pled the Jones Act claim.

The court then turned to the *Ryan v. Hercules Offshore, Inc*. issue, noting the disagreement among the district courts in its wake. It noted that *Gregoire v. Enter. Marine Serv., LLC*, 38 F.Supp.3d 749 (E.D.La. 2014) provides a compelling argument that the amendments to the removal statute did not impact the historical bar on removal of maritime claims filed at law in state court, explaining, "when a maritime claim is filed in state court under the Savings to Suitors Clause, it is transformed into a case at law, as opposed to admiralty." Therefore, the court held it did not have jurisdiction over the claim and granted the motion for remand.

Fuller Marine Serv., Inc. v. F/V WESTWARD, in rem, Civ. Case No. 2:15-cv-212-NT, 2015 WL 5674828, 2015 U.S. Dist. LEXIS 128936 (D. Me. Sept. 24, 2015).

Plaintiff filed a complaint against the vessel seeking foreclosure of a maritime salvage lien on the vessel. The U.S. Marshall for the District of Maine arrested the vessel, and transferred it to Fuller Marine as custodian. Default was entered against the vessel. However, the defendant appeared solely to argue that salvage liens do not attach to a vessel's fishing permits. The court noted that there is no formula for salvage awards, which should be discretionary, and that professional salvors should receive higher grants than chance salvors, citing to *The Blackwall*, 77 U.S. 1 (1869), while noting the value of the award may not exceed the value of the property saved.

Plaintiff argued that fishing licenses, as appurtenances of the vessel, were part of the value of the ship. The owner took the position that the permits were fungible licenses, not property saved. The court considered *Gowen v. F/V Quality One*, 244 F.3d 64 (1st Cir. 2001), which concerned a lien for wharfage and repairs. The court found that licenses were part of the appurtenances and essential to the evaluation of credit provided to a vessel. Accordingly, the judge considered the value (1) the value of the vessel; (2) the value of the licenses; and (3) the value of property that would have been destroyed had Fuller not engaged in the salvage operation in making its award.

Anglers Conservation Network v. Pritzker, No. 14-509, 2015 WL 5885341, 2015 U.S. Dist. LEXIS 135320 (D. D.C. Oct. 5, 2015) *Compare Anglers Conservation Network v. Pritzker*, 809 F. 3d 664 (D.C. Cir. 2016).)

Plaintiffs brought a case against National Oceanic and Atmospheric Administration ("NOAA") and the National Marine Fisheries Service ("NMFS") pursuant to the Magnuson-Stevens Fishery and Management Act ("MSA"), 16 U.S.C. § 1801; NEPA, 42 U.S.C. § 4321; and the APA, 5 U.S.C. § 701. Defendants promulgated a rule amending the fishery management plan governing the mackerel, squid, and butterfish (MSB) fishery of the eastern coast of the United States. Plaintiffs alleged defendants: (1) failed to include four species of river herring and shad as "stocks" to be regulated by the MSB plan; and (2) failed adequately to consider the environmental impact of their chosen course.

This dispute centered around the treatment of four species of anadromous fish (two shad and two herring) — fish that spend most of their lives in the ocean but migrate upstream to fresh water in the spring to spawn, and play a critical role in the biology of rivers, estuaries, and ocean waters on the Atlantic seaboard. The defendants issued a 50-page administrative decision on August 12, 2013, finding the listing of river herring as threatened and endangered under the Endangered Species Act as unwarranted as the NMFS determined that neither species of river herring was in danger of extinction or likely to become so for the foreseeable future. The defendants were unable to make any determination regarding the shad.

Shad and herring are exposed to the Atlantic mackerel, squid, and butterfish seasons under the Fishery Management Plan as the herring and shad are frequently taken in the catch and either discarded or sold as incidental catch. The two particular issues concerns Amendments 14 and 15 to the Mid-Atlantic Fisheries Management Plan ("MSB FMP"), which the plaintiffs had proposed, but had not been adopted. See 75 Fed.Reg. 32.745, 10.029 (Feb. 24, 2014). In particular, plaintiffs proposed that Amendment 14 requires additional on-board observers for compliance and

argued for the inclusion of the shad and herring stocks in the MSB FMP. Amendment 15 in turn was an attempt to add shad and herring to the stock for the MSB FMP.

The standard of the review under the APA is whether the challenged agency action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. While the court review is highly deferential, it will not merely rubber stamp the agency decisions.

The court roundly rejected the NMFS's legal arguments on the addition of stocks, but upheld its decision. First, it rejected the position that the decision of whether to add stock rests with regional counsel. Citing *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D. D.C. 2012). Second, it rejected the government's position that because the issue of whether to add stocks was at issue in Amendment 15, it had no need to address it on the ground that promises of future compliance do not alleviate the government from its current legal obligation. Third, the government argued it did not need to address the issue every time it updated a FMP, which, to the extent accurate, the court held inapplicable in this case because an agency acts arbitrarily or capriciously when it fails entirely to consider an important aspect of the problem. Finally the court rejected the argument that before they could appeal the plaintiffs needed to attempt a different course of having the stocks added. However, from a factual point of view, the evidence supported the government's position not to include the stocks. In granting the government's motion for summary decision, the court noted that the government has no obligation to add stocks to a fishery because the impacts of doing so are likely to be positive. The court likewise upheld the decision not to mandate 100% observer coverage through a cost sharing between participants and the NMFS. The court accepted the NMFS' argument that to have adopted the amendment would have been in violation of the Anti-Deficiency Act's prohibition against unauthorized future outlay spending.

However, the court agreed with plaintiffs on the NEPA charge. NEPA is evaluated under a "take a hard look" standard, which requires Environmental Impact Statements ("EIS").

Plaintiffs argued the government's EIS failed to evaluate the proposed addition of stocks and that therefore, the government failed to "take a hard look". The court agreed, noting the EIS failed to include a sufficient number of alternative plans and outcomes, and highlighted the fact that the EIS failed to justify why it did not consider the alternative of adding the stocks.

COMMITTEE ON INLAND WATERS AND TOWING

Chair: Buckley McAllister
Editor: Marissa Henderson

NEWSLETTER

Fall 2015

MARINE CASUALTY REPORTING – U.S. COAST GUARD GUIDANCE AND SELECTED CASES

Kent Roberts
Schwabe Williamson & Wyatt
Portland, Oregon

Most people involved in operating commercial vessels, and most legal practitioners advising those vessel operators, are generally familiar with the requirements at Title 46, Code of Federal Regulations, Part 4 for reporting marine casualties and accidents. Prompt reporting is essential for timely U.S. Coast Guard investigations and for the Coast Guard to respond to a casualty where assistance is needed. More importantly, lessons learned from prompt investigations can improve safety for maritime operators going forward.

The rules and circumstances around marine casualty reporting are, however, complex, and some in the industry feel there has been inconsistent enforcement by the Coast Guard. Recognizing this, the Coast Guard developed and, on July 21, 2015, issued a new Navigation and Vessel Inspection Circular (NVIC) on marine casualty reporting procedures. The circular, NVIC 01-15 (located at http://www.uscg.mil/hq/cg5/nvic/pdf/2015/navic-01 15_Marine_Casualty_Reporting20150721.pdf) does a great job of reviewing standard interpretations of the casualty reporting rules. The NVIC clarifies some uncertainty in interpretation, particularly around "bump and go" groundings, and provides useful policy interpretations to assist parties in casualty reporting. All

practitioners are encouraged to review this NVIC in detail, and to make sure their clients are aware of its contents and interpretations.

Failure to follow the Coast Guard rules on marine casualty reporting can result in Coast Guard fines against the vessel owner or operator, and against licensed individuals involved in the incident. The marine casualty reporting requirement also triggers the marine employer's obligation to determine whether there is any evidence of alcohol or drug use by individuals directly involved in a reportable marine casualty. See 46 CFR §4.05-12 and 46 CFR Subpart 4.06. Failure properly to report a marine casualty, or failure properly to drug and alcohol test following a marine casualty, has been used in some civil cases in efforts to shift burdens of proof, to create negative inferences about conduct or causation, or as a sword against the vessel operator in an effort to enhance civil liability, with mixed results.

In *Tisbury Towing & Transportation Co. v. Tug VENUS, et al.*[1] the plaintiff tried to use failure to report as a burden shifting tool. A barge owner, Tisbury, claimed its barge suffered grounding damage, but the grounding had gone unreported. As a consequence, Tisbury could not determine exactly when over several voyages the barge may have been grounded in order to meet its burden of proof that the tug had caused the barge damage. The tug master admitted that a grounding incident had occurred on one voyage but claimed it was with a different barge in tow. Tisbury argued that because this admitted grounding was not reported pursuant to 46 CFR §4.05-1, Tisbury was denied direct evidence of exactly when the grounding occurred and whether the plaintiff's barge was involved. Tisbury contended that this failure to report, which Tisbury claimed was part of a cover-up, should shift to the tug owner the burden of producing evidence of causation and explaining how plaintiff's barge was damaged. But there was no other evidence available as to when Tisbury's barge was grounded. The court held that absent other direct evidence the tug had grounded Tisbury's barge, failure to report an admitted incident which may or may not have involved

[1] 251 F.3d 298, 2001 AMC 2703 (1st Cir. 2001)

the plaintiff's barge was insufficient to shift the burden of proving causation.

NVIC 01-15 should prove useful for vessel operators setting their own internal policies for regulatory compliance in marine casualty reporting. A couple of cases have been influenced by a vessel operator adopting a policy on casualty reporting that was inconsistent with Coast Guard requirements. One such case is *Clark v. Icicle Seafoods, Inc.*[2] where the plaintiff sought to use the employer's incorrect reporting policy and failure to file CG-2692 casualty reporting forms to establish liability or shift to the defendant the burden of proving causation. The plaintiff, working as shipboard fish processor, claimed he was injured pulling a fish cart from a freezer using a chain handle. There were no witnesses and the parties disputed how the accident occurred. There had been a prior, similar injury involving the freezer cart which the company had reported to the Alaska OSHA office, but not to the Coast Guard. The vessel operator contended it filed OSHA reports for production worker and processer injuries, and filed Coast Guard reports only for injuries involving crew members with navigation duties.

The plaintiff in *Clark* convinced the court that the company's policy was wrong and that the vessel operator should have filed a CG-2692 for both incidents. The plaintiff argued that the Coast Guard is more diligent at investigating marine casualties than the state OSHA agency, so had the earlier injury incident been properly reported to the Coast Guard, the investigation might have resulted in preventing the subsequent injury to the plaintiff. But this line of argument involved too much speculation on too many levels. The court found that the failure to file Coast Guard reports, including one for the plaintiff's injury, was not a contributing cause of the plaintiff's injuries. The court did not invoke the Pennsylvania rule to shift the burden of proving causation to the defendant.

In re Crosby Tugs, L.L.C., [3]involved an oil spill and pipeline damage when the tug WEBB CROSBY grounded on a pipeline that

---

[2] 2007 U.S. Dist. LEXIS 85723 (W.D. Wash. 2007)
[3] 2005 U.S. Dist. LEXIS 48397 (E.D. La. 2005)

had been maintained at an improperly shallow level. The WEBB CROSBY had been operating in a very shallow waterway and had grounded several times during the day before hitting the pipeline. In apportioning 50% fault to Crosby Tugs, the trial judge listed a number of violations of statutes and regulations, including the Inland Rules. One was violation of the marine casualty reporting requirement. While 46 CFR §4.05-1(a)(1) requires immediate reporting of a marine casualty involving an unintended grounding, the Crosby Tugs operations manual only required its tug personnel to report "groundings that exceed one hour or in which equipment is damaged." The court found that the company's procedure violated 46 CFR §4.05-1. This restrictive definition allowed groundings that occurred earlier in the day of the accident to go unreported, and caused the final grounding that resulted in the casualty to be reported late. Although this was not described by the trial court as a violation which directly led to the pipeline allision, it lengthened the list of regulatory violations and negligence findings which together raised Crosby Tugs' allocation of fault to 50%.

The court in *Crosby Tugs* seemed to suggest that in the context of the particular facts in the case, prompt reporting of the earlier unintended groundings may have led Crosby Tugs or the Coast Guard to become more aware of the shallow pipeline exposure in the waterway, potentially preventing the casualty. In most situations, however, it is clear that a violation of casualty reporting rules does not contribute to the cause of a casualty and thus is not a statutory violation that can be used to allocate fault. This argument was made in *Joseph v. Tidewater Marine, LLC*[4], where an injured seaman claimed that the vessel owner's failure to report his slip and fall as a marine casualty and to file a form CG-2692 should bar any consideration of the plaintiff's own comparative fault in the fall that he claimed led to a hernia. The court ruled that even if the vessel operator was required to file a CG-2692, about which there was some question, failure to do so was not a cause of the seaman's injury. Hence improper casualty reporting was not a legal basis for excluding evidence of a plaintiff's comparative fault.

[4] 2002 U.S. Dist. LEXIS 15711, 2002 WL 1870025 (E.D. La. Aug. 13, 2002)

Likewise, in *Martin v. SMAC Fisheries, LLC*,[5] an injured seaman sought summary judgment prohibiting the vessel owner from arguing comparative fault because the fishing vessel owner did not have the crew drug tested following the plaintiff's injury. The court denied the plaintiff's motion because it was not clear that failure to drug test the crew under 46 CFR §4.06-3 had any causal connection to the plaintiff's injury. There were also material issues of fact as to whether or not the plaintiff's injury constituted the type of marine casualty that would trigger the drug testing requirement. The plaintiff also had the temerity to argue he could not be charged with comparative fault because a crewmember possessed marijuana on the fishing boat, in violation of regulation. The crewmember with the marijuana was the plaintiff himself! Not surprisingly, the plaintiff's motion to apply the statutory fault doctrine for this reason was also denied.

While the failure to report a marine casualty would not ordinarily be a contributing cause of a marine casualty, it is still a statutory violation that can trigger serious consequences in the context of commercial contracting. *Fitch Marine Transport, LLC, et al v. American Commercial Lines, LLC, et al*.[6] involved claims for wrongful termination of bareboat charters for four towboats under charters containing a minimum performance standards clause. The clause referenced marine casualties as defined in 46 CFR §4.05-1 and stated that "the minimum standard is that zero marine casualties occur". The charter further required the charterer to comply with all applicable laws. During the charter term, one of the tugs experienced a vibration and divers found a cable and line wrapped around one of the propellers. When the tug was drydocked to address this issue, the owner conducted an inspection and found that both propellers had also suffered damage from a previous unintended grounding. The charterer had not reported this grounding to the owner or the Coast Guard. The vessel owner then terminated the charters for failing to comply with applicable operational laws and regulations, specifically the failure to report the grounding as a marine casualty as required by 46 CFR §4.05-1.

---

[5] 2012 U.S. Dist. LEXIS 57553 (D. Alaska 2012)
[6] 2010 U.S. Dist. LEXIS 127834 (E.D. La 2010)

The court reviewed the evidence from the drydocking and determined that in fact the damage was due to a grounding of a type that was required to be reported to the Coast Guard. Thus the termination of the bareboat charters for violation of 46 CFR §4.05-1 was found to be justified.

No discussion of cases interpreting marine casualty reporting requirements would be complete without mention of *Hazelwood v. State of Alaska*[7]. Following the EXXON VALDEZ oil spill, Capt. Joseph Hazelwood was convicted of negligent discharge of oil, a misdemeanor under Alaska law. When the EXXON VALDEZ struck Bligh Reef, Capt. Hazelwood immediately reported the marine casualty to the Coast Guard as required by 46 CFR Part 4. Because the casualty involved pollution, Hazelwood argued he was entitled to the immunity protection stated at 33 USC §1321(b)(5) requiring immediate notification of any oil spill and including the clause "[N]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." Hazelwood contended the State's prosecution arose from information obtained by the exploitation of his notification about the grounding and spill, and after a lengthy analysis, the Alaska Court of Appeals agreed, albeit reluctantly.

Lastly, there is the recently decided case of *Greger Pacific Marine, Inc. v. Oregon Offshore Towing, Inc.*[8] Practitioners working with towing industry clients will find the facts in the case a bit hard to believe. It is a case in which the vessel operator's failure to report two marine casualties or to conduct drug and alcohol testing following either was used to create and support inferences of gross negligence in towing.

Greger Pacific purchased an inland derrick barge, the DB-560, and an inland crane barge, the WEEKS 243, in Hawaii. It then contracted with Oregon Offshore to tow them to San Francisco. The

---

[7] 836 P.2d 943, 1992 AMC 2423 (Alaska Ct. App. 1992)
[8] 214 U.S. Dist. LEXIS 93786, 2014 AMC 2284 (D. Or. 2014)

towing contract contained a mutual "name and waive" insurance clause, requiring Greger Pacific to insure the barges and waive subrogation against the tower. This arrangement effectively insulated Oregon Offshore from liability for negligent towing. Greger Pacific did not purchase insurance, and so under the contract was required to absorb all claims that would otherwise have been covered by insurance.

The two barges were not loadlined, so they required USCG trip permits for the tow to San Francisco. Greger Pacific did not get trip permits for either barge. Greger Pacific was later fined by the Coast Guard for this violation. The captain of the towing tug OCEAN EAGLE, Capt. Cooley, raised the lack of trip permits with the Oregon Offshore president and was told to "just tow" the barges. He later testified that he believed the reason there were no trip permits is that the Coast Guard would not have passed the barges or let the tow proceed. There was conflicting evidence, however, whether the barges were nevertheless seaworthy for the tow.

Just 39 miles off the coast of Hawaii, the WEEKS 243, which was the second barge in the tandem tow, began to sink. The tug was unable to disconnect the WEEKS 243 from the tug so had to cut the tow wire, leaving portions of the tow rigging from both barges hanging from the now remaining barge, the DB-560. The barge sinking was classified as a "Serious Marine Incident," requiring immediate Coast Guard notification. Neither Capt. Cooley nor Oregon Offshore reported the sinking. Oregon Offshore was later assessed a substantial Coast Guard fine for failing to report. Capt. Cooley and his crew were also required to take drug and alcohol tests under 46 CFR §4.05-12. They did not do so. Capt. Cooley later told the Coast Guard that the drug testing kits were no longer on board the tug at the time of the barge sinking. Alcohol testing kits were on board but the captain explained he did not administer those tests because he had not seen anybody drinking. The Coast Guard fined both Oregon Offshore and Capt. Cooley for these violations.

Rather than returning to Hawaii, the president of Oregon Offshore instructed Capt. Cooley to continue towing the DB-560 to

California, which he did on a jury-rigged soft line at a speed – 5 knots – much too fast for the prevailing conditions. Six days later, the DB-560 sank as well. Again, Oregon Offshore and Capt. Cooley failed to report the second sinking to the Coast Guard and again failed to administer drug and alcohol tests to the crew members. Oregon Offshore and Capt. Cooley both conceded that had the OCEAN EAGLE returned to Hawaii after the sinking of the WEEKS 243, the DB-560 would have arrived safely and not been lost. Capt. Cooley also had just come off a one year suspension of his captain's license for testing positive for cocaine, and he had recently been fired by another tug company for drug violations.

On these facts, Oregon Offshore moved for summary judgment because Greger Pacific failed to obtain insurance, arguably relieving Oregon Offshore of liability under the mutual name and waive clause. Greger Pacific responded that its claim was for liability based on gross negligence and under prevailing 9th Circuit law, towers cannot validly contract out of their own liability for gross negligence. So the court had to decide whether there were disputed issues of fact regarding whether Oregon Offshore was grossly negligent. Not surprisingly, the court found a number of disputed facts concerning whether Oregon Offshore was grossly negligent in towing the two barges. The company's violations of 46 CFR Subpart 4 played heavily in the court's decision:

> First, there is the reasonable inference of possible drug or alcohol use by the crew of the *Ocean Eagle*. Despite the well-established and well-understood reporting requirements that are triggered after a Serious Marine Incident, Capt. Cooley did not report to the Coast Guard the sinking of either the WEEKS 243 or the DB-560. Moreover, the captain did not administer the required drug or alcohol tests, claiming that the drug kits were not onboard the *Ocean Eagle* (but unable to explain why the drug kits were found onboard by the Coast Guard only a month before). Further, Capt. Cooley's own history of work-related drug incidents may be evidence of a motive for not reporting the Serious Marine Incidents

> because, if there had been drug use involved, Capt. Cooley could have feared a repeat, or worse, of the suspension or firing that he previously experienced.

After denying summary judgment, the court went on to rule on several evidentiary motions. Oregon Offshore sought to exclude evidence of Capt. Cooley's prior drug and alcohol use. Had Oregon Offshore and Capt. Cooley complied with the marine casualty reporting requirements, this evidence likely would have been excluded. Instead, the court ruled:

> [f]urther, the references to Capt. Cooley's drug and alcohol use may be admissible as evidence of motive under Fed. R. Evid. 404(b)(2). Capt. Cooley's past work related problems regarding drug or alcohol use, coupled with his awareness that a positive test could again result in suspension or loss of his job, may provide a motive for not reporting the two relevant Serious Marine Incidents to the Coast Guard.

CONCLUSION

While these cases show that problems in marine casualty reporting may not be determinative in subsequent tort litigation, defending maritime claims becomes a whole lot simpler if vessel operators get marine casualty reporting right. Moreover, vessel owners who adequately report accidental groundings and other marine casualties can avoid substantial contractual problems and evidentiary headaches.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Chair: Andrew C. Wilson
Editor: Julia M. Moore

NEWSLETTER

Spring 2015

RECENT CASES OF INTEREST

Editorial Note:

This edition of the Newsletter contains several decisions of interest on the maritime doctrine of utmost good faith, *uberrimae fidei strictissimi*. In the last eight months, the Eighth Circuit and the First Circuit have formally, and explicitly, adopted the doctrine as entrenched federal precedent. In doing so, both appeals courts relied upon the legal analyses and conclusions of their sister circuit courts which previously confirmed the continued vitality of this venerable maritime doctrine. As we noted in the Fall 2014 Newsletter, MLA Report, Doc. No. 816, Fall 2014, 18484, the Fifth Circuit remains the sole court of appeals affirmatively to reject the doctrine as entrenched maritime precedent. There is no circuit court decision yet from the Fourth, Sixth or Seventh courts of appeals, although district courts located within those circuits have applied the doctrine, relying on the decisional law from other circuits.

Uberrimae Fidei/Utmost Good Faith

Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing and Marine Services, Inc., 778 F.3d 69 (1st Cir. 2015).

In February of this year, the First Circuit Court of Appeals finally and authoritatively declared that the maritime doctrine of *uberrimae fidei,* or utmost good faith, was entrenched federal precedent in the First Circuit. Noting that its prior decisional law had been less than definitive, the First Circuit has now fully

embraced the doctrine by "joining the near-unanimous consensus of our sister circuits, ruling without further equivocation that the doctrine of *uberrimae fidei* is an established rule of maritime law in this Circuit." *Catlin (Syndicate 2003),* 778 F.3d at 80-81.

The decision arose out of the September 2011 sinking of the PERSEVERENCE, a floating dry dock owned by San Juan Towing and Marine Services, Inc. ("San Juan"). Since 2009, San Juan had been unsuccessfully attempting to sell the PERSEVERENCE due to declining business and increasing financial distress. At the time of the loss, the sale value of the dry dock had dropped from $1.35M to $700,000. In February 2011, the PERSEVERENCE also lost its insurance coverage. San Juan then presented an application for new insurance to Catlin, but failed to disclose substantial preexisting hull damage or the declining market value of the dry dock, as evidenced by the decreasing value of purchase offers. Catlin insured the vessel for an agreed value of $1.75M based on a 2006 survey. On September 19, 2011, a deal to sell the dry dock for $700,000 fell through. Less than 10 days later, the PERSEVERENCE sank at the dock when a water hose used to fill a ballast tank flooded the vessel. Apparently, no one remembered to turn it off. Refloating the PERSEVERENCE took over a month and it was discovered that the underside of the drydock was substantially rusted and decayed. Catlin filed a declaratory judgment action seeking to declare the policy void *ab initio* based on San Juan's violation of *uberrimae fidei*. After a trial on the merits, the district court declared the policy void *ab initio*. San Juan appealed.

As a threshold matter, the First Circuit addressed the question of whether federal admiralty law applied to the controversy. San Juan urged application of local Puerto Rico statutory law. Although it noted that the Jones Act granted Puerto Rico more power to legislate in the admiralty and maritime field than if it were a state, the court still rejected San Juan's position that local laws governed the dispute. The court then took a firm stand in favor of the doctrine of utmost good faith and declared it to be entrenched federal precedent in the First Circuit. The court noted that its ruling "should hardly be surprising" since the Supreme Court declared marine insurance contracts to be *uberrimae fidei* in 1828.

The court concluded that "based on both the policy rationales supporting *uberrimae fidei* and the longstanding history and consistent application of the doctrine by most of the other circuits, we formally recognize *uberrimae fidei* as an established admiralty rule within this Circuit." *Id.* at 82. In applying the doctrine, however, the circuit court disagreed with the district court's ruling that the policy was void *ab initio*. The circuit court held, instead, that the doctrine rendered the policy *voidable* at the election of the insurer.

Cont'l Cas. Co. v. Hochschild, No. L-3051-09, 2014 WL 6474297 (N.J. App. Div. Nov. 20, 2014)

While the last eight months have seen the Eighth and First Circuit Courts of Appeal embrace the doctrine of *uberrimae fidei*, the New Jersey Superior Court, Appellate Division remains unconvinced. In an unreported decision, the appellate division was asked to review a lower court's order which voided an insurance policy on the recreational vessel SANITY CHECK due to misrepresentations in the application for insurance. The facts revealed that the owner had substantially inflated the purchase price, failed to disclose prior losses, and failed to disclose prior insurance cancellations, among other misrepresentations. The lower court entered summary judgment for Continental based, in part, on the Third Circuit's decision in *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255, 2008 AMC 2300 (3d Cir. 2008) which held that the doctrine of *uberrimae fidei* applied to misrepresentations in a marine insurance policy. The lower court also found that the insured violated New Jersey insurance fraud statutes and committed equitable fraud.

The New Jersey Appellate Division, however, decided that the *Cassin* decision was not a "mandate" to apply *uberrimae fidei* under New Jersey state law. It further distinguished *Cassin* by noting that the facts in *Cassin* had no "nexus to New Jersey" while the case before it involved a New Jersey boat and boat owner. The appellate division also noted that the SANITY CHECK was a recreational vessel, unlike the commercial vessel in *Cassin*, and that the *Cassin* policy called for application of "entrenched federal

admiralty law" while the SANITY CHECK'S policy was silent on choice of law. The appellate division stopped short of ruling that the doctrine of *uberrimae fidei* did not apply to a recreational vessel, but its decision was critical of Continental's position that the doctrine was entrenched and governed the dispute. Ultimately, the appellate division dodged the issue entirely by affirming the court below on equitable fraud grounds.

For the sake of accuracy, a review of the *Cassin* decision indicates that the appellate division's view might have been too narrow. *Cassin* holds: "[w]e affirm our prior precedent, and conclude that the doctrine of *uberrimae fidei* is well entrenched and therefore controls this dispute." *Cassin*, 544 F. 3d at 263. This decision contained no mention of well settled Supreme Court precedent declaring the supremacy of maritime law when it is "entrenched."

Securian Cas. Co. v. Markel Am. Ins. Co., No. 13-cv-798, 2015 WL 300432 (E.D. Wis. Jan. 22, 2015)

In this case, Markel issued an insurance policy on a speedboat purchased by the insured with a loan from a financing company. The policy named the financing company as a lienholder and a designated "loss payee." After the insured vessel was stolen and stripped of its equipment, Markel filed suit against its insured seeking a declaration that its insurance policy was void due to material misrepresentations in the application for the insurance. Markel did not name the loss payee in the suit. Thereafter, Markel and the insured settled the action. Again, the loss payee was not advised. Only after the insured stopped making payments to the financing company did it become aware of the loss. The financing company's subrogee, Securian, then filed suit against Markel, asserting that it breached the contract by paying the insured and not the loss payee.

The court found that, while Securian had standing as a loss payee to bring suit under the insurance contract, it was settled law that Securian's rights were derivative of the insured's and that Securian had no greater rights under that contract than the insured

possessed. In this case, the district court determined that the insured had no rights under the insurance contract due to the material misstatements in the application. Noting that the doctrine of *uberrimae fidei* obligates the parties to a marine insurance policy to accord each other the utmost good faith, the court found that the insured, in this case, breached that obligation. As a result, the policy was void. Because Securian's rights were derivative, and because the policy was void, Securian had no rights under the policy. Securian then argued that Markel's settlement payment to the insured breached its contract with the loss payee financing company. The district court acknowledged that there was some authority supporting the view that bypassing the loss payee and paying the insured could result in liability to the loss payee. The court distinguished that authority as arising in the context of a valid insurance contract. Here, the contract was void and the court noted that it had not been informed of any authority that allowed such a claim in those circumstances.

AIG Centennial Ins. Co. v. O'Neill, 782 F. 3d 1296, 2015 AMC 1217 (11th Cir. 2015)

This case arose out of a series of unfortunate mistakes made by the insured, and the insured's broker, in applying for a marine insurance policy covering the BRYEMERE, a sixty-six foot sport fishing vessel. O'Neill purchased the vessel for $2.125M, incorporated a limited liability company (the "LLC") to take ownership of the BRYEMERE, and applied for a preferred ship mortgage with Bank of America ("BOA"). O'Neill also applied for insurance with AIG using Willis as his broker. BOA gave O'Neill a mortgage of $1.976M and requested, as a condition of the loan, that the insurance policy contain a clause that would protect BOA's interest in the BRYEMERE in the event that the underlying insurance was found to be void. Unfortunately for O'Neill, he delegated the insurance application process to his secretary. As a result, the insurance was issued in his name as "Owner" and not the actual owner, the LLC; the application also failed accurately to describe O'Neill's prior loss history and the purchase price was listed as $2.35M instead of the actual purchase price of $2.125M. After the sale was final, the vessel sailed from Florida to Rhode

Island. During the voyage, considerable flexing was noted in the vessel's hull. Upon arrival, it was concluded that the vessel was "unseaworthy, dangerous and unsafe for any use." O'Neill made claim on the AIG policy. In response, AIG filed a declaratory judgment action seeking to void the policy *ab initio*.

Following an eight (8) day trial, the district court determined that the "age-old" doctrine of *uberrimae fidei* applied and that O'Neill's misrepresentations in the application voided the insurance. BOA, however, argued that O'Neill's misrepresentations had no effect on its coverage because of the standard mortgage clause in the policy which provided that BOA's coverage was not impaired or invalidated by act, omission or neglect of the owner. Typically, this clause would protect the mortgagor from a misrepresentation by the insured owner, unlike the clause in *Securian Casualty Company v. Markel American Insurance Company*, 2015 WL 300432 (E.D.Wis. Jan. 22, 2015) also discussed in this newsletter. However, in the typical case, the identity of the owner-insured and the mortgagor are the same. In this case, the erroneous naming of O'Neill as insured "owner" instead of the LLC meant that the named insured was neither the owner of the insured property nor the mortgagor on the loan for which the insured property was collateral. As a result, BOA could not recover. The court emphasized that the distinction between O'Neill and the LLC was "no mere technicality." The court then found that the vessel owner LLC had never entered into an insurance contract with AIG, that while the mortgage was signed by O'Neill in his capacity as managing member of the LLC, the fact that O'Neill's name was on the insurance policy meant that O'Neill acted on his own behalf, and not on behalf of the LLC, in procuring the insurance. The court then added that of all the parties, BOA was the one in the best position to insure that its interest in the loan was protected, which it did not do. BOA was denied indemnification.

Insurance Contract Construction

In re Deepwater Horizon, 470 S.W.3d. 452, 2015 AMC 1491 (Tex. Sup. Ct. Feb. 13, 2015)

In a recent decision stemming from the 2010 explosion of the DEEPWATER HORIZON, the Texas Supreme Court denied BP an additional $750M in coverage as an additional insured under Transocean's insurance policies. The decision issued in response to two certified questions from the Fifth Circuit Court of Appeals:

> 1. Whether *Evanston Insurance Co. v. Atofina Petrochemicals, Inc.,* 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?
>
> 2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *Atofina* case, 256 S.W.3d at 668, given the facts of this case?

Id. 470 S.W.3d at 455, 2015 AMC at 1492 *quoting from In re Deepwater Horizon*, 728 F.3d 491,500, 2013 AMC 2429, 2441 (5th Cir. 2013).

BP argued for a narrow construction of the "additional insured" provision, claiming that the court could not infer a comma into a contract clause where one did not exist. Transocean and its insurers argued for a reasonable interpretation of the clause which gave meaning to the intent of the parties and which was consistent with industry custom and understanding of the clause. In finding for Transocean and its insurers, and denying BP an additional $750M in insurance coverage, the Texas Supreme Court answered the first

certified question in the negative, finding: (1) the Transocean policies included language which necessitated consultation of the drilling contract to determine BP's status as an additional insured; (2) BP's status as an additional insured under the drilling contract was inextricably intertwined with the limitations on the extent of coverage to be afforded under the Transocean policies; (3) the only reasonable construction of the drilling contract's additional insured provision was that BP's status as an additional insured was limited to liabilities Transocean assumed in the drilling contract; and (4) BP was not entitled to coverage under the Transocean policies because BP, not Transocean, assumed liability for such claims. The court did not reach the second question.

Of interest, the court noted in a footnote that there is an apparent conflict between Texas law, which allows the inference of punctuation in order to ascertain the intentions of the parties, and maritime law, which apparently does not.

Atl. Marine Florida, LLC v. Evanston Ins. Co., 775 F.3d 1268 (11th Cir. 2014)

Atlantic Marine Florida, LLC ("AMF") and its comprehensive marine liability insurer filed suit against a marine engineering firm Guido Perla & Associates ("GPA") and GPA's professional liability insurer, Evanston, seeking reimbursement of defense expenses incurred in defending AMF in a wrongful death action by the estate of a ship's captain. The captain died from compression asphyxiation when he became trapped by a bulkhead door in such a way that his position prevented rescuers from accessing the door's emergency release mechanism. The door and the release mechanism were designed by GPA and installed by AMF.

On appeal, the Eleventh Circuit was presented with two issues: (1) was Evanston was obligated to provide a defense to AMF; and (2) was Evanston obligated to reimburse AMF's insurer for its contribution to a settlement with the Captain's estate. The court answered both questions in the negative. First, the court found that that the professional liability policy did not cover AMF's

negligence in installing the door, that there was no coverage elsewhere in the policy for AMF's own tortious conduct, and that coverage was further lacking as AMF had not been "adjudged liable" due to its settlement with the estate. Second, the court found that there was no obligation to indemnify AMF's insurer for the settlement amount as it failed to establish that AMF's liability for the death was "an act, error or omission of [GPA] arising out of the professional services" it performed.

Kan-Do Research & Prod., Inc. v. Great Lakes Reinsurance (UK) PLC, No. 8:12-cv-2923-T-33 TGW, 2015 WL 1754604 (M.D. Fla. April 17, 2015)

The KAN-DO was a vessel covered by an all risk marine insurance policy issued by plaintiff Great Lakes. The policy covered accidental damage to the "hull machinery and equipment" of the vessel under Coverage "A." When the KAN-DO flooded and sank at the dock due to the failure of the bilge pump system caused by a blown fuse, Great Lakes filed suit against the vessel owner contending that the policy did not cover the loss. Great Lakes claimed that the loss, caused by the failure of the bilge pump system, was not covered because damage to "engines, mechanical and electrical parts" was excluded under clause "r" unless the damage was caused by "an accidental external event such as a collision, impact with a fixed object, lightning strike or fire." The insured KAN-DO contended that this exclusion was ambiguous. The court agreed.

The court focused on the fact that exclusion "r" was inconsistent with other language in the policy providing all risk coverage, specifically Coverage "A." The court determined that without an agreed definition of the key terms, many of the same parts of the KAN-DO fell within both Coverage "A" and exclusion "r" making the policy ambiguous. The court construed the ambiguity against Great Lakes and held that the loss was covered.

Daniel F. Young, Inc. v. Seneca Ins. Co., No. 13-02431, 2014 WL 5480810 (E.D. Pa. Oct. 30, 2014)

This decision arose out of a logistic company's coverage dispute with its commercial liability insurer over a valuation clause. The insured, Daniel F. Young, Inc. ("DFYI"), contended it was entitled to be indemnified for $143,789.79, representing the full replacement value of damaged cargo which it paid to its customer. Seneca contended DFYI's recovery was limited to $4,000 by the package limitation in the bill of lading covering the customer's cargo. The court found that the valuation provision of the policy clearly and unambiguously stated that valuation was based on the insured's liability under its contract with the cargo owner. As the contract with the cargo owner (the bill of lading) contained a package limitation, DFYI could not recover the replacement value of the cargo.

An interesting side note to this decision is the fact that Seneca removed the case from a Pennsylvania state court by asserting that the claim arose under federal law, pleading that the services provided by plaintiff were governed by COGSA. A review of the decision, however, reveals that COGSA played a tangential role, at best, in the dispute which primarily concerned the construction of a commercial insurance policy.

Duty to Defend

Lyman Morse Boatbuilding, Inc. v. N. Assurance Co. of Am., 772 F. 3d. 960 (1st Cir. 2014)

Lyman Morse Boatbuilding, Inc. ("LMB") contracted to build a luxury yacht for a customer. Upon delivery, the customer was very dissatisfied and commenced an arbitration against LMB and Cabot Lyman, the controlling owner of LMB. The arbitration complaint contended *inter alia* that the vessel was defective, and that the customer was overcharged, defrauded, etc. LMB and Cabot Lyman tendered its defense to Northern Assurance Company ("NAC") which declined to defend. LMB and Cabot Lyman retained counsel to defend the arbitration proceeding and then filed suit

against NAC to recover the costs and attorney's fees incurred. On cross motions for summary judgment, the district court concluded that NAC was obligated to defend Cabot Lyman, but not LMB. The district court's decision hinged on the exclusion in NAC's policy for "property damage to your product." The district court found that this clause excluded coverage for the arbitration which arose out of the customer's dissatisfaction with LMB's product, thereby falling within the ambit of the "your product" exclusion. In contrast, because the yacht was LMB's product, the court found that NAC had a duty to defend Cabot Lyman.

On appeal, the First Circuit relied on Maine law, which the parties agreed applied to the dispute. In determining the scope of the duty to defend, Maine courts apply a "comparison test" in which the allegations of the complaint are "compared" to the policy to determine if the allegations fall within the scope of coverage. Because the duty to defend is broad, any ambiguity is resolved against the insurer. Applying these rules to the arbitration complaint filed by LMB's unhappy customer, the First Circuit found that the allegations did *not* suggest the potential for a covered claim against LMB. LMB valiantly tried to argue that allegations of "risk to life and limb" brought the claim within the ambit of the policy, but the court of appeals disagreed. The court focused on the essential facts of the claim, which were primarily based on defective workmanship and, therefore, excluded from coverage. Therefore, NAC had no duty to defend LMB.

With regard to the duty to defend Cabot Lyman, the First Circuit reversed the district court finding that the "your product" exclusion *did* apply to Cabot Lyman because the policy defined the words "you" and "your" as the Named Insured listed on the policy. Here, the Named Insureds were LMB and Cabot Lyman. Therefore, the "your product" exclusion applied by its plain terms. The court of appeals noted that its ruling was dictated by the nature of the CGL policy at issue which covered "occurrence of harm" risks, but not "business risks."

Choice of Law

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Brickyard Vessels, Inc., No. 1:14CV921, 2014 WL 5684585 (E.D. Va. Nov. 4, 2014)

This decision arose out of a collision between two vessels off the coast of Miami, Florida which resulted in the deaths of two passengers. National Union insured the vessel MASTERPIECE, which was owned by Brickyard Vessels ("Brickyard"). After investigating the claim, National Union denied coverage based on Brickyard's breach of warranties. At the time of the loss, MASTERPIECE was ineligible to carry passengers for hire, was operated by an unlicensed Master, and the number of passengers aboard exceeded USCG regulations. Brickyard counterclaimed asserting a claim for statutory bad faith under Florida law. National Union moved to dismiss the counterclaim, claiming that Virginia law applied. The district court agreed.

To arrive at its conclusion, the district court first had to determine which choice of law rules would be applied. "The first step in a choice of law analysis involving multiple grounds for subject matter jurisdiction is to determine the basis of the court's jurisdiction." Noting that National Union's complaint was filed under the court's diversity *and* admiralty jurisdiction, while Brickyard's counterclaim invoked only diversity jurisdiction, the district court resolved the issue by determining that the insurance contract at issue was "maritime" in nature and that the court had to apply federal common law in its choice of law determination. Relying on the choice of law analysis in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Advani Enterprises, Inc. v. Underwriters at Lloyds*, 140 F.3d 157 (2d Cir. 1998), the court noted that federal choice of law rules compelled it to determine which state's law applied by "ascertaining and valuing the points of contact between the transaction…and the states or governments whose competing laws are involved." The following factors all supported the application of Virginia law: Brickyard's principal place of business was in Virginia, National Union's policy to Brickyard was "delivered" to the insured in Virginia, Brickyard's Virginia address was on the fact of the policy, and National Union's place of

performance (i.e. payment of claims) would occur in Virginia. The only factor supporting application of Florida law was the location of the vessel in Florida, which was insufficient to support application of Florida law.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Chair: Andrew C. Wilson
Editor: Julia M. Moore

NEWSLETTER

Fall 2015

Editorial Note:

Once again, this edition of the Newsletter leads with a focus on the maritime doctrine of utmost good faith, *uberrimae fidei*. First, there is an article by Joe Grasso based on his recent presentation on the current status of the doctrine as interpreted by the various federal circuits. To date, the U.S. Supreme Court has yet to weigh in on the issue.

Next, there are case summaries, beginning with a recent circuit court decision strictly interpreting the doctrine, or, *uberrimae fidei strictissimi.* In that instance, the United States Court of Appeals for the Eighth Circuit examined the parameters of the doctrine, and determined that this defense to coverage is not available in the absence of reliance on the part of the underwriter. The opinion purports to break new ground by explicitly declaring reliance as a distinct element of the doctrine. That said, practitioners in this area will recognize the Eighth Circuit's analysis as a variation on the theme of materiality which is applied by other circuits. The decision appears to be the first to explicitly declare that reliance and materiality are distinct elements, and that both are required to void a policy.

UBERRIMAE FIDEI IS ALIVE AND WELL IN THE U.S

By Joseph G. Grasso

Three federal appellate circuits have weighed in this year on the question of whether the duty of utmost good faith (*uberrimae*

fidei) is an entrenched concept of U.S. admiralty law. All three held that it is. *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.*, 798 F.3d 715, 2015 AMC 2113 (8th Cir. 2015); *AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296, 2015 AMC 1217 (11th Cir. 2015); *Catlin at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69, 2015 AMC 694 (1st Cir. 2015).

Two of these decisions reaffirmed earlier holdings (*O'Neill* (11th Circuit) and *Abhe & Svoboda* (8th Circuit)), and one held for the first time that the concept is indeed entrenched in our federal admiralty law (*San Juan Towing* (1st Circuit)). This brings the number of circuit courts holding that the duty of utmost good faith is an entrenched concept under U.S. admiralty law to six. *See*, in addition to the three cases cited above: *St. Paul Fire & Marine Ins. Co. v. Matrix Posh*, *LLC*, 507 F. App'x 94 (2nd Cir. 2013); *SW Traders LLC v. United Specialty Ins. Co.*, 409 F. App'x 96 (9th Cir. 2010); *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255, 2008 AMC 2300 (3d Cir. 2008). These circuit courts are all in line with the seminal U.S. Supreme Court decisions on the duty. *See McLanahan v. Universal Ins. Co.*, 26 U.S. 170 (1828); *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311 (1928) (the latter case involving a non-marine policy and a misrepresentation on an application for a life insurance policy).

The lone circuit holding otherwise continues to be the Fifth Circuit. *See, Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.,* 585 F.3d 236, 2010 AMC 185 (5th Cir. 2009); *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991).

Application of the Concept

While the concept of utmost good faith is widely accepted as entrenched in U.S. admiralty law (the Fifth Circuit notwithstanding), there remain subtle differences as to how the concept is applied in insurance coverage disputes from circuit to circuit. In particular, some decisions have required only a showing of materiality (generally an objective standard – would the information that was not disclosed or misrepresented have

influenced the underwriting decision of a "prudent underwriter"?), while others have also required a showing of reliance or inducement on the part of the underwriter (a subjective standard – did the information that was not disclosed or misrepresented actually influence the underwriting decision of the underwriter who wrote the risk?). Many decisions have either glossed over this difference or failed to address it.

However, the Eighth Circuit recently addressed this issue head on in the *Abhe & Svoboda* case. In that case, the court held that the underwriter must demonstrate reliance as well as materiality in order to rescind a policy based on breach of the duty of utmost good faith. The court also used the term "inducement" in describing the requirement, and it noted that the underwriter needs to, in effect, demonstrate *causation* as part of reliance (as distinct from the element of materiality, where causation is not required). There is a petition for rehearing pending in the case, and it remains to be seen whether other circuits will also require a showing of reliance. (At least one other circuit, the Second, has noted in passing that reliance is a necessary element of a cause of action for rescission based on the breach of the duty of utmost good faith. *See Knight v. U.S. Fire Ins. Co*, 804 F.2d 9 (2d Cir. 1986).

Will the Fifth Circuit Ever Join the Rest?

Following the decision in *Anh Thi Kieu*, the principal reason given by the Fifth Circuit panels facing the issue, all of which have followed the holding in *Anh Thi Kieu*, has been that one panel cannot overrule another in the Fifth Circuit. *See Durham Auctions*, 585 F.3d at 241. The question therefore remains whether the Fifth Circuit, sitting *en banc*, would overturn the *Ahn Thi Kieu* decision. Given the trend among other circuits and the widespread criticism of the *Anh Thi Kieu* holding by other courts, one has to think that there is a likelihood that the answer is "yes." But will the issue ever be brought to the entire circuit sitting *en banc*?

What Would the Supreme Court Do?

The question also remains, given the existing split in the circuits, whether the Supreme Court might ultimately weigh in and, if so, how it would rule. While it is perhaps unlikely that the Supreme Court would agree to hear a case involving this issue, if it does, it might be persuaded by the majority of circuits as well as the precedent from that Court on which the concept is based. (*McLanahan; Stipcich*). However, if the issue ever does make it to the Supreme Court's docket, the insured will undoubtedly raise the U.K.'s recent revision of the Marine Insurance Act to remove the duty of utmost good faith. Nonetheless, it seems clear that the concept is well-entrenched in U.S. admiralty law.

RECENT CASES OF INTEREST

Uberrimae Fidei/Utmost Good Faith – Reliance Required

St. Paul Fire & Marine Insurance Co. v. Abhe & Svoboda, Inc., 798 F.3d 715, 2015 AMC 2113 (8th Cir. 2015).

After affirming the doctrine of *uberrimae fidei* as entrenched federal maritime precedent in *New York Marine and General Insurance Co. v. Continental Cement Co., LLC*, 761 F.3d 830 (8th Cir. 2014), the United States Court of Appeals for the Eighth Circuit returned to the issue to decide whether a showing of reliance was required in order to void a marine insurance policy for breach of the duty. Following the Second Circuit's decision in *Puritan Insurance Co. v. Eagle Steamship Co., S.A.,* 779 F.2d 866 (2d Cir. 1985), the Eighth Circuit declared that a showing of reliance was a necessary element of the *uberrimae fidei* defense.

This decision arose out of the sinking of dumb barge SE-34 leased to insured Abhe & Svoboda ("A&S") and being used as a stationary equipment platform for a bridge painting project. The leasing agreement for barge SE-34 required A&S to conduct a survey, which revealed that the SE-34 had pinholes in its deck, that the under-deck tanks lacked watertight integrity, and that it was valued at $90,000, which reflected the value of the scrap metal "plus

a little bit more because the barge was still useful." Three months into the painting project, A&S purchased a new marine package insurance policy from St. Paul. St. Paul did *not* request that A&S complete an application for insurance, but accepted an application submitted to the prior insurer. The schedule of vessels on that application did not include the SE-34, and it also stated that none of the scheduled vessels were surveyed within the last two years because, at the time of that application, the survey of the SE-34 had not yet been performed. Subsequently, A&S provided St. Paul with an updated schedule of vessels, indicating that the SE-34 had a value of $225,000 based on the agreed value stated in the lease agreement for the barge. A&S did not provide St. Paul with the leasing survey, and St. Paul did not attempt to survey any of the A&S vessels as it was entitled to do.

Several months after the policy attached, the SE-34 sank during a nor'easter. The barge landed upside down, crushing the equipment that had been welded to its deck. After the loss, A&S provided its insurer with a copy of the SE-34's survey, lease agreement and salvage plans. The Coast Guard ordered the wreck removed, and efforts to salvage the wreck and the barge's equipment resulted in claims between A&S and the salvage company. A&S sought coverage from St. Paul for defense costs and indemnification in connection with that dispute. St. Paul denied coverage for that dispute based on A&S's failure to disclose the 2010 survey on its application for insurance. On summary judgment, the district court held that St. Paul was under no obligation to provide a defense or indemnity. A&S appealed and the Eighth Circuit reversed.

The issue on appeal was whether an insurer could void a marine insurance policy for violation of *uberrimae fidei* without a showing that the insurer relied upon the non-disclosure in issuing the policy. The court of appeals noted that "[t]here is surprisingly little authority on whether a showing of reliance is required to void an insurance policy under the doctrine of *uberrimae fidei*." To resolve the issue, the Eighth Circuit turned to the Second Circuit again for guidance. Relying upon the Second Circuit's decision in *Puritan Insurance Co., supra* which held that "the principle of *uberrimae fidei* does not require the voiding of the contract unless

the undisclosed facts were material *and relied upon*...," the Eighth Circuit found that reliance was a necessary element and that the Second Circuit's reasoning in *Puritan* was "persuasive." *Id.* at 720 (citations omitted). The Eighth Circuit also found support for its ruling in general contract law which holds that a misrepresentation by omission has no legal effect unless it induces action by the recipient.

This decision concedes that most circuit courts do not explicitly require proof of reliance as a distinct element of the doctrine of utmost good faith:

> While most circuits have not explicitly recognized reliance as a distinct element of the *uberrimae fidei* defense, some courts have applied a subjective test for materiality that asks whether the insurer in fact would have found the omitted information to be material. The standard applied by these circuits effectively requires a showing of actual reliance by the insurer, because it defines a material fact as one that the insurer relied upon.

Id. at 721 (collecting cases). The Eighth Circuit then drew a distinction between materiality and reliance, stating: "These decisions are consistent in substance with our conclusion, but we think clarity is enhanced by preserving actual reliance and objective materiality as distinct elements." *Id.* at 722. The court explained that materiality examines whether a fact would have influenced a reasonable and prudent underwriter's decision to write the risk, while the reliance test examines whether there was a causal connection between the misrepresentation or concealment and the actual underwriter's decision to issue the policy. *Id.* Applying this test to the facts at hand, the circuit court found sufficient evidence present in the record below to support reversing the grant of summary judgment. *Id.* The court determined that there were questions of fact surrounding the issue of whether the undisclosed facts were material *and* whether St. Paul relied upon them when it wrote the risk. *Id.*

Nanolab Technologies, Inc. v. Roanoke Claims Services, Inc., No. 5:14-02699, 2015 WL 2356905 (N.D. Cal. May 15, 2015)

While the typical *uberrimae fidei* case involves a vessel, in this case, underwriters sought to void an open marine cargo policy covering the truck transportation of a spectrometer from Mexico to California based on the plaintiff's failure to disclose to the underwriter that part of the transportation would include carriage in a non-air-ride van across Mexico City before transfer to an air-ride van for carriage to California. Plaintiff Nanolab argued that the doctrine of *uberrimae fidei* could not be invoked to void the coverage as the insurance was not "marine." Nanolab argued that marine insurance only insured against losses that are specifically marine in nature. The district court disagreed. Relying on California law, the court held that "[b]y the plain language of the statute, there can be no question that transportation over land is covered in a marine insurance contract." *Id.* at *2. The court also noted that the policy itself was titled "Marine Open Cargo Policy" which completely undercut Nanolab's argument that it was not on notice that the coverage was a marine insurance policy.

The district court then ruled against the underwriters and concluded that questions of fact existed as to whether a reasonable person would conclude that details of the type of truck transportation were material to the underwriter's decision to write the risk given the fact that the underwriter's own insurance quote used the generic term "truck" and no mention was made of an air-ride requirement. Based on the record, the district court held that a reasonable jury could conclude that Nanolab was not required to disclose the additional information.

Breach of Marine Insurance Warranty

Guam Industrial Services, Inc. v. Zurich American Insurance Co., 787 F.3d 1001, 2015 AMC 1521 (9th Cir. 2015).

This coverage action arose out of the sinking of a dry dock loaded with 113,000 gallons of oil during a typhoon on Guam. No oil leaked from the containers due to the sinking. The dry dock,

owned by Guam Industrial Services, Inc. ("Guam Industrial") was covered by two insurance policies: one policy covered damage to the dry dock, the other policy covered liability for property damage caused by pollutants. After the dry dock sank, Guam Industrial made a claim under both policies for its losses. Both insurers denied the claims, and suit followed. The district court granted summary judgment in favor of both insurers by finding that the dry dock policy was voidable due to the Guam Industrial's failure to comply with an express warranty. The court also found that the second policy was never triggered because no pollutants were released.

The dry dock was covered by a named perils hull and machinery policy which required, as an express warranty and condition of coverage, that Guam Industrial obtain and maintain a Navy Certificate for the dry dock. The Navy Certificate ensures that the dry dock has satisfied a certain level of structural integrity and is the highest standard in the industry. Despite the warranty, Guam Industrial did not obtain a Navy Certificate. Instead, it obtained a "commercial" certificate. At the time of the loss, the commercial certificate had expired and the issuer of the certificate would not renew it unless Guam Industrial completed substantial repairs to the dry dock. The dry dock was in the process of being repaired when it sank.

The Ninth Circuit began its analysis by noting that typically, a court must determine whether to apply state or federal maritime law to interpret an insurance policy. In this case, however, the district court found that it need not decide which law applied as both state and federal maritime law required a strict construction of warranties in a marine insurance policy. The court held, "[t]he federal rule, if one in fact exists, is that admiralty law requires the strict construction of express warranties in marine insurance contracts; breach of the express warranty by the insured releases the insurance company from liability even if compliance with the warranty would not have avoided the loss." *Id.* at 1004-1005. The court reached the conclusion despite the fact that Guam's courts had not yet spoken on the issue. Following the rule that when state courts are silent on an issue, the federal courts must make a reasonable determination of how the state's highest court might rule if deciding

the case, the Ninth Circuit determined that Guam would follow the law of California since Guam's insurance statutes were derived from California law. California law requires strict compliance with warranties when they are material. The court then held, "[u]ltimately, whether derived from federal admiralty law or state law, we conclude that the law requires strict compliance with marine insurance policy warranties, *even when the breach of the warranty did not cause the loss*." *Id.* at 1005 (emphasis added). Guam Industrial argued that underwriters had waived their right to demand strict compliance with the Navy Certificate warranty because it had previously accepted the commercial certification. The court noted that even if underwriters had waived the requirement of a Navy Certificate, the underwriters had not waived the requirement of the commercial certificate which was expired when the dry dock sank.

The court then addressed the claim under the ocean marine policy covering property damage caused by pollutants. Finding that it was obligated to enforce the plain and unambiguous language of the policy, the court held that the sealed barrels of oil did not constitute "pollutants" under the plain terms of the policy. The court held that since there was no actual discharge of pollutants, even though the containers of oil were submerged after the sinking, the cost of retrieving the containers was not covered by the policy's coverage for cleanup after "discharge, dispersal, release or escape" of pollutants.

Breach of Warranty – State Law, Economic Loss Rule

Federal Insurance Company v. Mathews Brothers, LLC, No. 1:14-03794, 2015 AMC 2189, 2015 WL 4879194, (D. Md. Aug. 14, 2015)

This decision arose out of the sinking of the yacht RIVER RAT requiring repairs totaling over $750,000. The cause of the sinking was attributed to the improper installation of the fuel cooler discharge line which caused a nipple fitting to break allowing seawater to enter the vessel. Plaintiff Federal Insurance Company ("Federal") paid out its policy limits for the loss and became subrogated to the rights of the yacht owner. Federal then sued the

builder of the yacht, defendant Mathews Brothers, LLC ("Mathews") and the supplier of the engine, Alban Tractor, Co. ("Alban"), asserting causes of action for breach of warranty and negligence. On a motion to dismiss, the district court determined that Federal's complaint failed to meet the pleading standards required by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and all claims against the defendants were dismissed.

With respect to the causes of action asserting breach of express warranty, breach of the implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose, the district court stated that it was undisputed that Maryland state law applied, as it was well established that a contract for the sale of a yacht was a non-maritime contract and that any claim for breach of warranty in the sale of a yacht did not state a cause of action in admiralty. The court was then faced with the question of whether the state law warranty claims were time-barred. Defendants claimed that the Maryland Commercial Code ("UCC") with a four year statute of limitations applied. Plaintiffs argued that a section of the Maryland state commercial law governing contracts with a three-year from discovery rule applied. To resolve the question, the district court analyzed whether the "predominant factor" or "thrust" of the contracts at issue was for the sale of goods or the supply of services. The court concluded that the contracts were predominantly to provide goods – the vessel and the engine – and that any necessary labor to install the engine was of secondary concern. Relying upon *East River S.S. Corp. v. Delaval, Inc.*, 476 U.S. 858 (1986) the court held that contracts relating to the construction of, or supply of, materials to a ship and warranty claims grounded in such contracts were governed by state law, and in particular, the Uniform Commercial Code. As a result, the UCC statute of limitations applied, and the claims were time-barred.

With respect to the negligence claims, the court dismissed these as barred by admiralty's economic loss rule. The court noted that while state law governed the warranty claims, admiralty law governed the negligence claims. The district court held that, under admiralty law, the economic loss rule generally prohibits a party

from recovering in tort when a defective product harms only the product itself, but causes no loss or damage to person or other property. Therefore, as Federal sought recovery for damage to the vessel itself, and not for damage to any person or other property, the economic loss rule barred the negligence claims. Federal argued that the economic loss rule was inapplicable, as the damage was caused by a defective *service,* not a defective product. The court rejected this claim based on decisional law from the Fifth Circuit, which holds that the economic loss rule adopted in *East River* precludes recovery in maritime tort for purely economic losses stemming from the negligent performance of a contract for professional services when those services are rendered as part of the construction of a vessel. The district court acknowledged that the Fourth Circuit had yet to speak authoritatively on the issue, but that it found the reasoning of the Fifth Circuit sufficiently persuasive.

Finally, with regard to the claim for breach of the warranty of workmanlike performance, the district court found that the warranty was essentially an admiralty application of the rule that a party who agrees to perform a service is obligated to do so in a workmanlike fashion. Because the court had previously determined that the contracts at issue were not maritime contracts, the court held that the implied warranty of workmanlike performance did not apply.

No Right to Jury Trial in Marine Insurance Coverage Action

Travelers Property Casualty Company of America v. Ivy Marine Consultants, L.L.C., No. 14-0378, 2015 WL 2128935 (S.D. Al. May 5, 2015)

Plaintiff Travelers filed a declaratory judgment action against its insured seeking a declaration that it had no obligation to pay for damage to a vessel under a marine insurance policy. In filing the complaint, Travelers pleaded that jurisdiction was founded upon 28 U.S.C. §1333 and Rule 9(h) of the Federal Rules of Civil Procedure. Travelers also pled diversity jurisdiction. The insured filed a counterclaim for coverage against Travelers and demanded a

jury trial. The court requested briefing on the issue of whether any party or claim was entitled to a jury trial.

There was no question that cases involving marine insurance contracts give rise to admiralty jurisdiction and that the election to proceed in admiralty under Rule 9(h) precludes a defendant from exercising a right to trial by jury. The real issue was whether Traveler's pleading of diversity jurisdiction nullified the Rule 9(h) election. The court held, based on Fifth and Eleventh Circuit precedent, that the Rule 9(h) election controls the basis for jurisdiction, even if another basis for subject matter jurisdiction exists and is acknowledged in the complaint.

Duty to Defend

XL Specialty Insurance Company v. Bollinger Shipyards, Inc., 800 F.3d 178, 2015 AMC 2371 (5th Cir. 2015)

This decision arose out of litigation between Bollinger Shipyards ("Bollinger") and the United States over Bollinger's performance of a multimillion dollar contract with the United States Coast Guard to upgrade eight (8) U.S.C.G. cutters to 123-foot vessels. The vessels failed, and the United States filed suit against Bollinger asserting fraud, unjust enrichment, negligent misrepresentation and violation of the False Claims Act. The claims between the U.S. and Bollinger led to additional suits between Bollinger and its insurers which were removed and consolidated. Both XL and Bollinger filed competing motions for summary judgment in the district court. The district court granted XL's motion that it was under no obligation to defend or indemnify Bollinger in connection with the underlying claims filed by the U.S. An appeal followed.

Adhering to the well-settled principle that an insurer's duty to defend is determined solely by comparing the allegations of the complaint with the terms of the policy (i.e. the "eight corners" or "four corners" rule), the court compared the allegations of the underlying complaint against Bollinger with the policy terms and conditions. The court determined that all five claims set forth in the

complaint fell within two exclusions of XL's policy. The first exclusion at issue barred coverage for claims that Bollinger's products did not meet a predetermined level of fitness or performance. The court affirmed that this exclusion applied to the government's claims for unjust enrichment and negligent misrepresentation. With respect to the remaining claims for common law fraud and violation of the False Claims Act, the court found that these claims were excluded by a clause barring coverage for dishonesty, infidelity or breach of federal law regulating or controlling unfair or deceptive practices. As all of the causes of action fell within one of the two exclusions, XL was under no obligation to defend.

The ruling in favor of XL also had implications for Bollinger's claim against its excess carrier, Continental. As a result of the judgment in XL's favor, the court held that Continental's excess coverage could not be implicated, as there were no remaining claims that could result in exhaustion of Bollinger's lower level coverages. Further, the court found that the claims under the False Claims Act were not covered since the excess policy insured only property damage and personal injuries.

Stein v. Northern Assurance Company of America, 617 F. App'x 28 (2d Cir. 2015)

This decision determined that an insurer failed to meet its burden of affirmatively establishing that it was entitled to disclaim coverage. The court noted that under New York law, an insurer owes its insured a duty to defend whenever the allegations of the complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. The Second Circuit reiterated that an insurer's duty to defend claims is ordinarily ascertained by comparing the allegations of the complaint with the wording of the insurance contract and noting that it is "well established" that a liability insurer must defend if the pleadings allege a covered occurrence even if facts outside the four corners of the complaint indicate that the claim may be meritless or not covered. The Second Circuit mentions in a footnote that New York law is "unclear" regarding the circumstances in which a court may

consider extrinsic evidence in making coverage determinations, citing *IBM v. Liberty Mutual Insurance Co.* 363 F.3d 137, 148 n.4 (2d Cir. 2004). However, in this case, the court determined that the insurers could not meet that burden and the court was not obligated to delineate the precise scope of the extrinsic evidence exception to resolve the case.

Care, Custody & Control Exclusion

Collins v. A.B.C. Marine Towing, L.L.C., 123 F. Supp. 3d 841, (E.D. La., 2015).

This decision arose out of a fatal allision of a crane barge against the Florida Avenue Bridge spanning the Inner Harbor Navigational Canal in Louisiana. The allision occurred when the tug M/V CORY MICHAEL was towing a crane barge and crane (collectively the "crane barge") and the mast of the crane barge allided against the bridge causing the crane boom to fall on the pilot house, killing the pilot and injuring several other crew members. At the time of the incident, the owner of the tug, ABC Marine, had a Master Service Agreement with the owner of the crane barge, Boh Bros., which stated that ABC Marine would defend, indemnify and hold harmless Boh Bros. from liabilities in connection with ABC Marine's operations or performance of the agreement. ABC Marine also had several insurance policies, both primary and excess, under which it claimed coverage for the death and other losses. The primary insurer accepted coverage for Boh Bros.' claim against ABC Marine and entered into a settlement agreement. The excess insurers (Underwriters at Lloyd's London) contended that the losses sustained by the crane barge fell within a policy exclusion for damage to property in its care, custody and control.

The key question before the court was whether a barge under tow is within the "care custody and control" of the tower. The court concluded that it was not. Central to the court's analysis was a Supreme Court decision from 1932 in which the Court held that under a towage contract, the tug was not the bailee of the vessel in tow or its cargo. While excess underwriters argued case law in which a tower was found to have "control" of its tow, the court

distinguished these cases in favor of finding coverage. The court stated:

> While the Court both recognizes that there is no Fifth Circuit law directly on point to the issue and appreciates Excess Insurer's position that courts have found tugs to be in control of barges in particular instances, the "purpose of liability insurance is to afford the insured protection from damage claims" [citation omitted]…Therefore, "a provision which seeks to narrow the insurer's obligation is strictly construed against the insurer, and, if the language of the exclusion is subject to two or more reasonable interpretations, the interpretations which favors coverage must be applied."

123 F.Supp.3d at 847.

Based on the principles of construction and reasonableness, the district court ruled that the "care custody and control" language was synonymous with bailment and not towage and, accordingly, the exclusion did not apply.

Who is a Named Insured?

International Offshore Services, LLC v. Linear Controls Operating, Inc., --- F. Supp. 3d ---- 2015 WL 4875472 (E.D. La. Aug. 12, 2015)

This declaratory judgment action arose out of an allision by the vessel M/V INTERNATIONAL HUNTER against an unmanned oil production platform in the Gulf of Mexico resulting in personal injury to a passenger. As a result, the owner of the vessel filed suit against the employer of the injured passenger seeking a defense and indemnity pursuant to certain contracts between them. The oil platform owner also brought a claim against the employer's commercial liability insurer contending that it was a "named insured" under the policy issued to the employer and was, therefore,

entitled to coverage. The insurer argued that the platform owner was not covered under the policy and filed a motion for summary judgment.

The main issue in dispute was whether the platform owner ("Apache") was a named insured or an additional insured. The distinction was important, as the policy provided coverage for personal injury to a named insured, but not to an additional insured. The district court examined the language of the policy including the preamble, definitions and declarations sections and determined that Apache was not listed as a named insured and was not included in any definition of "named insured." The only place in the policy where Apache appeared was an endorsement adding it as an additional insured. While this endorsement also modified the policy to include Apache as a named insured, such coverage applied "only with respect to liability arising out of your ongoing operations performed for that insured." As determined by the court, this clause did not grant Apache the status of "named insured" with respect to the personal injury claims at issue.

Apache argued that the terms of its contract with the platform owner required that it be covered as a named insured under the policy, and that it had paid premium in exchange for coverage which complied with *Marcel v. Placid Oil Co.,* 11 F.3d 563 (5th Cir. 1994). Apache further argued that as an additional insured, it was entitled to the same coverage as the named insured. The district court rejected these arguments based on the policy language which it found to be clear and unambiguous.

Rosano v. Freedom Boat Corp., No. 13-cv-842, 2015 WL 4162754 (E.D.N.Y. July 8, 2015)

Plaintiff Rosano was the owner of a vessel that he leased to Freedom Boat Corp. and others. As part of the lease agreement, the leasees were obligated to purchase insurance to cover the hull and liability of the vessel. American Modem Insurance Group then issued a policy to Freedom Boat Club, LLC, and a lien holder. Plaintiff Rosano was neither listed as a named insured or an additional insured. After the vessel was damaged and American

Modem declined to pay Rosano for the loss, Rosano filed suit claiming damage to the vessel, breach of contract, and breach of an insurer's obligation to pay insurance claims. Only American Modem appeared in the action.

In deciding whether Rosano was entitled to coverage, the court examined the plain language of the policy and rejected Rosano's claim. The court stated that "only the policy owner has standing to sue based on an insurance policy." *Rosano* at * 4 (citations and quotations omitted). The court further found that there was no evidence that Rosano was intended to be covered as a third party beneficiary. Summary judgment in favor of the American Modem was granted.

COMMITTEE ON YOUNG LAWYERS

Chair: Blythe Daly
Vice Chair: Jennifer Porter
Secretary: Imran O. Shaukat

NEWSLETTER

Vol. 2015-2 - October 2015

"THEORETICALLY QUARTERLY"

Message from the Chair

It's hard to believe the fall MLA meeting has arrived. This year's meeting will be held October 20 – 24, 2015 in Bermuda. I hope everyone who can has made plans to attend, and that the men have packed their shorts and knee socks.

In addition to the many events and activities planned, there will be an opportunity to receive up to 12 hours of CLE credit, substantive committee meetings, a beach party on Thursday, the general business meeting, and the Friday night dinner dance. Of course, the highlight of the week will be the YLC's CLE presentation on Thursday afternoon, following which we will have a committee business meeting. I look forward to seeing you there.

I would like to extend a special thanks to all YLC members who have volunteered for committee work since our last meeting. Since the May meeting, we have appointed several new liaisons to the standing committees. Recently, several members were appointed to the special committee on maritime cybersecurity. The contributions of our members are vital to the work of the Association. Thank you.

See you in Bermuda!

- Blythe Daly

YLC in Bermuda

The YLC will anchor Thursday's CLE programs with a presentation on Hot Topics.

Thursday, October 22, 2015
3:45 – 5:00 p.m.
Mid-Ocean Amphitheatre

- Violation of *Uberrimae Fidei*: Void *Ab Initio* or Voidable?
  by: Alberto Castañer-Padró

- West Coast Longshoreman Strike Synopsis,
  by: Jennifer Porter

- Maintenance & Cure Update,
  by: Aaron B. Greenbaum

- E-Discovery, Facebook Shenanigans and Fraud,
  by: Marissa Henderson

Following the CLE presentation, the YLC will have a fall business meeting at the resort:

Thursday, October 22, 2015
5:00 - 6:00 p.m.
Gardenia I Room/Lobby

One topic to be discussed is a joint CLE with Young CMI in New York in May 2016. Please start brainstorming possible topics. There is no call-in option for the meeting.

While there are limited options for "off-campus" events in Bermuda, there will still be plenty of opportunities to taste the local spirits!

Fall Meeting Highlights

While the YLC CLE presentation and our business meeting will be "don't miss" events, the following CLE's and meetings may also be of particular interest:

- **Jones Act Citizenship – What Every Maritime Lawyer Needs to Know**

  Thursday, October 22, 2015
  11:15 a.m. – 12:15 p.m.
  Mid-Ocean Amphitheatre

- **Insights From In House Counsel**

  Friday, October 23, 2015
  9:00 a.m. – 10:15 a.m.
  Mid-Ocean Amphitheatre

- **International Organizations, Conventions and Standards**

  Friday, October 23, 2015
  3:00 p.m. – 5:00 p.m.
  Rose Room

  YLC Member Kate Belmont will present a Cybersecurity CLE.

- **Salvage**

  Friday, October 23, 2015
  3:00 – 5:00 p.m.
  Orchid Room/Mezzanine

  Twain Braden, author of In Peril, will give a 45-minute presentation.

  Jed Powell will give a 20-minute presentation on treasure from the Islander.

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program assigns one YLC member to each of the MLA's standing committees to serve as a liaison. The goal of the program is to increase the communication between the standing committees and the YLC. The hope is that increased communication will lead to opportunities for our members in those committees as well as increased utilization of the YLC for committee projects. Liaisons provide brief status reports at each YLC meeting pertaining to the work and projects of each standing committee.

A chart identifying the appointed liaisons is posted under the documents section of the YLC page on the MLA website. Let this serve as a reminder to our liaisons that the YLC is ready to work. Spread the word to your respective committees and please call on us when we can be of service.

If you are interested in volunteering to serve as a YLC liaison, please email the YLC Secretary, Imran Shaukat, at ishaukat@semmes.com. If you are currently a YLC liaison and have a project that needs help, please e-mail both Imran and the YLC Chair, Blythe Daly, at blythe.daly@hklaw.com.

RECENT PROJECTS

At the request of Chet Hooper and David Nourse, the following YLC members assisted in proof-reading and cite checking the latest edition of the MLA Report: Corey R. Greenwald, Patrick J.R. Ward, J. Ben Segarra, Stephanie Propsom, and Christine M. Walker.

The Maritime Bankruptcy Committee finished a project last year regarding Global Marine Insolvency with the help of John Bradley and YLC liaison Warren Gluck.

ONGOING PROJECTS

The Recreational Boating Committee publishes a spring newsletter entitled "Boating Briefs". The newsletter reports on cases involving recreational boats as well as legislative and regulatory developments specific to recreational boating, such as state legislation capping sales tax on yachts, state passage of the Model State Boat Titling Act, mandatory boat operator licensing or education, and new or amended Coast Guard regulations. The Committee requests that members of the YLC keep a lookout for these types of developments and cases and report them to the Committee. In addition, if a YLC member has been personally involved in a particularly interesting case involving recreational boating, there may be an opportunity for that member to make a brief presentation about the case at the Recreational Boating Committee meeting in the spring. If you have anything to report, please contact the chair of the Recreational Boating Committee, Mark Buhler, at mark.buhler@earthlink.net, or the YLC liaison, Bo Williams, at bo.williams@ phelps.com

Peter Black, the YLC liaison to the Website and Technology Committee, advises us that the committee is in the process of establishing a LinkedIn page for the MLA. Watch for the page to go live and for opportunities to contribute to the same.

Jessica Martyn, the YLC liaison to the International Organizations, Conventions, and Standards Committee ("IOCS"), reports that the IOCS is in the planning stages of setting up a newsletter, which will be run by editors Stephanie Penninger and Lindsay Sakal, who are both YLC members. If additional YLC members are interested in assisting, please contact Jessica at jmartyn@pbh.com.

SPRING MLA MEETING

The 42nd conference of the Comité Maritime International will take place in New York May 3 – 6, 2016, and will coincide with the MLA Spring Meeting. This will be a unique opportunity for all members of the MLA to become more familiar with the work of the

CMI and to meet international maritime lawyers. Many of the MLA standing committee meetings will be held in conjunction with the CMI standing committee meetings. In addition, joint social events will be planned throughout the week. Of note, Young CMI will be invited to join the YLC at our traditional social event and dinner on Thursday, May 5, 2016. Both Young CMI and the YLC will be making a CLE presentation on Friday afternoon, May 6, 2016. Planning is ongoing, and we have reminded the planning committee that the YLC is a great resource.

CALL FOR PROJECTS

To the Standing Committees: Please let us know how we can help with your projects. If you have projects in need of research or have writing opportunities that are well-suited for younger lawyers, please keep our committee in mind. Additionally, we can usually find a YLC member to assist with staffing your meeting (handling CLE paperwork, sign-in sheets, handouts, and assisting with presentation set up, etc.), if and when the need arises.

PUBLICATION OPPORTUNITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to *Benedict's Quarterly Maritime Bulletin*. You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair, or director unless s/he is a Proctor or Non-Lawyer member. Proctor applications may be obtained from the MLA Membership Secretary or may be downloaded from the MLA website (www.mlaus. org).

YLC MEMBERSHIP LIST ON WEBSITE

If you are not already signed up as a member of the YLC on the MLA website, please make sure you do so. In addition, please review your email and notification settings on the website. We use the membership list on the website as a vehicle for communicating with our members. We have reason to believe that some of our young lawyers are not registered as YLC members or may have restrictive notification settings and thus do not receive our communications. If you know anyone that might fall into this category, please pass this along and encourage them to formally join the committee and to check their settings. Conversely, if you are no longer a YLC member and are tired of our shenanigans, feel free to unsubscribe.

VOID V. VOIDABLE: THE EFFECT OF THE BREACH OF THE DUTY OF UTMOST GOOD FAITH IN MARINE INSURANCE AND ITS FUTURE IN LIGHT OF THE UK INSURANCE ACT 2015*

By Alberto J. Castañer[1]

Introduction

Few doctrines of marine insurance are as old as the duty of *uberrimae fidei* (utmost good faith). In England, it was adopted in the 18th Century by Lord Mansfield in the pivotal case of *Carter v. Boehm*[2], later codified in the Marine Insurance Act 1906[3], and recently abandoned through the insurance reforms enacted in the *Consumer Insurance (Disclosure and Representations) Act 2012* ("CIDRA") and the *Insurance Act 2015*.

In the United States, courts sitting in admiralty have applied the doctrine for almost 200 years. The year 2015 saw a great deal of judicial activity regarding the duty of utmost good faith. However, uniformity as to the application of the doctrine and the effects of the breach of the duty is nowhere near the horizon. The recent decisions out of the First, Eight, and Ninth Circuits have all moved towards further entrenching the doctrine in American marine insurance law instead of following the international trend of jettisoning what has been called an "outdated" and "draconian" rule of law. In addition, these three decisions highlight inconsistency as

---

[1] Partner, Castañer Law Offices, P.S.C., San Juan, Puerto Rico; Adjunct Professor of Maritime Law, Interamerican University of Puerto Rico School of Law; Chair, Maritime Law Association of the United States Sub-Committee on U.S. Customs Brokers and Freight Forwarders; J.D. 2006 Interamerican University of Puerto Rico School of Law; LL.M. 2008, Tulane Law School.

(This paper was first presented at the 2015 Fall Meeting of The Maritime Law Association of the United States in Bermuda.)

[2] *(1766) 3 Burr 1905.*

[3] 6 Edw. 7, ch. 41, § 17, 18 (1906).

to the effects of the breach of the duty, mainly, whether the policy is voidable or void since its inception (*ab initio*).

This article will briefly examine the history of the duty of utmost good faith in marine insurance, address the latest cases on the doctrine, and discuss the implications that the recent UK legislative reform may have in the United States.

The Doctrine is Entrenched but Not Uniform: The "Void v. Voidable" Conundrum

There is very little doubt that the duty of utmost good faith is currently an entrenched principle of U.S. maritime law. As early as 1828 the U.S. Supreme Court in *McLanahan v. Universal Ins. Co.* [4] believed that *uberrimae fidei* should be a part of marine insurance. Since then, except for the Fifth Circuit, every federal Court of Appeals that has been faced with the issue of whether or not the doctrine is a federally entrenched rule of insurance law has answered the question in the affirmative.[5]

The concept is simple: the insured in a maritime insurance contract is required to disclose to the insurer all known circumstances and facts that materially affect the insurer's risk. "Material facts" are those which can possibly influence the mind of a prudent and intelligent insurer in determining whether it will accept a risk. There is no disagreement as to what the duty requires from the insured.[6] However, there seems to be some discrepancies in the case law as to the consequences of breaching the duty of

---

[4] *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Peters) 170 (1828) ("*McLanahan*").

[5] *See* e.g. *Lloyd's v. San Juan Towing & Marine Servs.*, 7b78 F.3d 69, 82 (1st Cir. 2015)("*San Juan Towing*"); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986) citing *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir. 1985); *AGF Marine Aviation & Transp. v. Richard C. Cassin Cit Grp./Sales Fin., Inc.*, 544 F.3d 255 (3d Cir. 2008); *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 837 (8th Cir. 2014); *Certain Underwriters at Lloyds v. Inlet Fisheries Inc.*, 518 F.3d 645, 650-54 (9th Cir. 2008); *HIH Marine Servs. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000). *See also Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 889 (5th Cir. 1991) ("[T]he *uberrimae fidei* doctrine is not "entrenched federal precedent."").

[6] Although the duty is reciprocal between the insured and the insurer, virtually every reported case deals with nondisclosures and misrepresentations made by the insured while procuring insurance and not the other way around.

utmost good faith. While some courts have held that the breach of the duty renders the policy void *ab initio*, others have concluded that the policy is merely voidable at the insurer's option. Surprisingly, no published opinion has devoted much ink to explaining why the policy should be void or voidable.

The 2015 cases serve to illustrate the inconsistencies. In *Lloyds v. San Juan Towing*, the U.S. Court of Appeals for the First Circuit affirmed the district court's judgment for the insurer based on the insured's breach of the duty of utmost good faith for misrepresenting the floating dry dock's value and failing to disclose the poor condition of its hull. But, the First Circuit modified the district court's holding "to reflect that the contract was voidable, not void ab initio."[7] The court did not put a lot of effort in explaining why. The First Circuit merely concluded that in the event that insured defaults, the insurer may void the policy at its option.[8]

Just a few months later, the Eight Circuit further expanded the doctrine in *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.*[9] In 2014 the Eight Circuit had held that the breach of the duty rendered the contract of marine insurance voidable.[10] But in 2015 the court was faced with the issue of deciding whether a non-disclosure of a material fact made by the insured while procuring insurance automatically gives the insured the right to void the policy or whether, in addition to demonstrating that the undisclosed fact was material, the insurer must demonstrate that it was relied upon when it decided to underwrite the risk.[11] In *Abhe & Svoboda* the insured failed to disclose a prior loss of one of the insured barges and the insurer sought a judgment declaring the policy void ab initio based on *uberrimae fidei*. The parties agreed that the insured was required to disclose all material facts to the insurer, but they disputed

---

[7] *San Juan Towing* at 83.
[8] *Id.* citing *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 57 F.3d 50, 54-55 (1st Cir. 1995).
[9] *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.*, 798 F.3d 715 (8th Cir. 2015)("*Abhe & Svoboda*").
[10] *See Cont'l Cement Co., LLC*, at 837.
[11] *Abhe & Svoboda* at 719.

whether there was an additional element to an insurer's claim that a policy is void for non-disclosure.[12]

The Eight Circuit decided to follow the Second Circuit's decision in *Puritan Insurance Co. v. Eagle Steamship Co. S.A.*[13] and held that an insurer seeking to avoid a policy must show reliance on the insured's non-disclosure, regardless of whether the insurer had knowledge of the undisclosed material fact at the time that it decided to issue the policy.[14] After finding that the insurer must demonstrate causal connection between the non-disclosure or misrepresentation by the insured and the underwriting of the risk, the Eight Circuit stated that its conclusion was further supported by need to prevent fundamentally unfair and unequitable insurance practices. The court stated:

> St. Paul Fire's proposed rule also would create a moral hazard on the part of marine insurers. It would have the perverse effect of encouraging insurers to assume unreasonable risks and to issue insurance policies that they otherwise would not have issued. Under the rule proposed by St. Paul Fire, if an insurer knows that an applicant for insurance failed to disclose or misrepresented a fact that other prudent insurers may deem to be material, that insurer would have an incentive to issue the policy anyway, collect premiums from the insured, and then use the doctrine of *uberrimae fidei* to void the policy if an accident occurs and the insured seeks to invoke the policy's protection. Allowing an insurer to void a policy based on the *uberrimae fidei* defense in that situation would not further the purpose of the doctrine to protect the insurer against liability caused by an insured's failure to act in good faith.

Therefore, if *San Juan Towing* and *Abhe & Svoboda* are read together, one could argue that if an insured is found to have breached

---

[12] *Id.*
[13] *Puritan Insurance Co. v. Eagle Steamship Co. S.A.*, 779 F.2d 866 (2d Cir. 1985).
[14] *Abhe & Svoboda* at 720.

the duty of utmost good faith by failing to disclose or misrepresenting material information to the insurer, the latter may only avoid the policy if it can show that the non-disclosure or misrepresentation was relied upon when it decided to undertake the risk and establish the terms to do so. The stark difference between these two decisions and the holding of the Eleventh Circuit in *AIG Centennial Ins. V. O'Neill* is night and day.[15]

In *O'Neill* the sole member of a limited liability company that owned the yacht, entrusted his secretary with filling out the application for insurance, which the court characterized as "a recipe for error." And indeed it was. The secretary, without instructions or assistance from either O'Neill or his insurance broker, filled out the application and inadvertently misrepresented who the owner was by listing O'Neill as the owner instead of the company. She also failed to disclose a prior loss O'Neill had when he lost a boat due to a fire. And last but not least, the secretary listed the purchase price as $2.35 million when it was really $2.125 after the previous owner adjusted the price considering that some repairs had to be made.

On its first voyage and after spending close to a quarter million dollars in repairs, the yacht's hull presented several structural defects which marine surveyors concluded rendered the yacht unseaworthy. O'Neill filed a claim under the policy and the insurer responded by filing a declaratory judgment action seeking affirmation that the insurance policy was void *ab initio*. The district court held that the policy was void *ab initio* in light of the misrepresented purchase price and O'Neill's non-disclosed prior loss history. The judgment was affirmed. According to the Eleventh Circuit when an insured conceals or misrepresents a material fact he commits "manifest fraud, which avoids the policy"[16] regardless of whether the misrepresentation is willful or accidental, or results from mistake, negligence, or voluntary ignorance. The court then affirmed the district court's findings that misrepresentations were made in the application and that the

---

[15] *AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296 (11th Cir. 2015)("*O'Neill*").
[16] *O'Neill* at 1303 quoting McLanahan, 26 U.S. at 185.

misrepresented purchase price was material as demonstrated by the testimony of two underwriters.

Despite making an analysis almost identical to that of the First and Eight Circuits of the insured's breach of the duty and the insurer's reliance on the misrepresentations and non-disclosures, the Eleventh Circuit concluded that the policy was void *ab initio* instead of voidable. But why? Historically under common law, an insurance policy has been considered a contract requiring the utmost good faith, and any misrepresentation of facts that are material to the risk being insured against, or any failure by the insured to disclose conditions affecting the risk, "could render a contract voidable at the insurer's option."[17] In England, from whence the doctrine was adopted, the remedy has always been that the insurer may avoid the policy.[18] The leading Maritime Law treatises agree that the consequence of the breach of the duty of utmost good faith is that the underwriter may avoid the policy.[19] But still, according to *O'Neill*, once the duty has been breached, the policy is automatically rendered void *ab initio*, not by the election of the insurer.[20]

"The distinction between *void* and *voidable* is often of great practical importance."[21] A "voidable" agreement is valid until annulled. It is capable of being affirmed or rejected at the option of one of the parties.[22] On the other hand, an agreement which is "void *ab initio*" is null from the beginning, as from the first moment when a contract is entered into often because it seriously offends public policy.[23] Thus, while the term "voidable" describes a valid act that

---

[17] 3-16 New Appleman on Insurance Law Library Edition § 16.08.
[18] Marine Insurance Act 1906, § 18(1); [1993] 1 Lloyd's Rep. 496, at 505-506 VERIFICAR.
[19] G. Gilmore & C. Black, The Law of Admiralty § 2-6, at 62 (2d ed. 1975); 2 T. Schoenbaum, Admiralty and Maritime Law § 19-14 at 319 (4th Ed., 2004) (describing rescission of the contract as "the universal remedy in both Britain and the United States").
[20] *O'Neill* at 1303.
[21] Black's Law Dictionary, 1568 (7th ed. 1999).
[22] *Id.*
[23] *Id.*

may be voided later, the term "void *ab initio*" describes an invalid act that never came to life but may be ratified.

The Void v. Voidable dilemma is of great importance in the context of *uberrimae fidei.* For example, some argue that in both Britain and the United States an insurer can waive the breach of the duty of utmost good faith.[24] However, if breach of duty of utmost good faith voids a policy *ab initio,* an insured may not raise affirmative defense of waiver or estoppel.[25] An insurance policy found to be void *ab initio* is nothing more than a stillborn that never took its first breath. The policy never came to life and one cannot waive a right that never existed in the first place. Consequently, the waiver defense would be available only on those judicial districts where the breach turns the policy voidable.

The Effect of the UK Insurance Act 2015 on *Uberrimae Fidei* in the United States

The entrenchment of the doctrine in federal maritime law and the above discussed circuit splits may become a thing of the past sooner than expected. Even though the doctrine has been adopted almost unanimously in the United States and has survived despite strong opposition and criticism by commentators, scholars, and judges alike, the enactment of the *Insurance Act 2015* and the CIDRA in the United Kingdom could put a stop to the application of the doctrine on this side of the pond as well.

Historically, the Supreme Court has stated that efforts should be made in the area of marine insurance to preserve the uniformity between English and American law.[26] In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* [27] Justice Frankfurter noted in his

---

[24] 2 T. Schoenbaum, Admiralty and Maritime Law § 19-14 at 318 (4th Ed., 2004)
[25] *See Certain Underwriters at Lloyd's, London v. Giroire,* 1998 AMC 2153, 2160, 27 F.Supp.2d 1306, 1312 (S.D. Fla. 1998)
[26] *Calmar Steamship Corp. v. Scott,* 345 U. S. 427, 442-443 (1953); *Standard Oil Company of New Jersey v. United States*, 340 U.S. 54, 59, 1951 AMC 1, 5 (1950); *Queen Insurance Company of America v. Globe & Rutgers Fire Insurance Company*, 263 U.S. 487, 493, 1924 AMC 107, 109-10 (1924).
[27] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 323 (1955) (''*Wilburn Boat*'') (Frankfurter, J., concurring in the result).

concurring opinion that "[t]he business of marine insurance ... demand[s] application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers." As Justice Reed put it in his *Wilburn* dissent "[o]ur admiralty laws, like our common law, came from England. As a matter of American judicial policy, we tend to keep our marine insurance laws in harmony with those of England."[28]

The reasons behind the judicial desire for uniformity in the marine insurance law with England are still present and may be even stronger. Today, the British marine insurance market is the third largest in the world after the U.S. and Japan.[29] In fact, the London Market[30] is the only place in the world where all of the largest insurers and reinsurers are represented. [31] Although the U.S. marine insurance market is substantial, "the operations of British concern are still of high importance in this country."[32] The U.S. Supreme Court and Article III courts sitting in admiralty "have expressly announced and followed a policy of deference to the English decisions in the field, recognizing not only the longer experience of those courts but also the great desirability of uniformity, given the close connections of the American and British insurance markets."[33] "Especially is uniformity desirable where, as here, the particular form of words employed originated in England."[34]

CIDRA became effective in 2012 and regulates consumer insurance, such as marine insurance for recreational vessels. To ease the draconian effects of pre-contractual non-disclosures and misrepresentations and to simplify the legal framework, CIDRA

---

[28] *Id.* at 325 (Reed dissenting) and citing *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.,* 263 U.S. 487, 493 (1924); *Calmar Steamship Corp. v. Scott,* 345 U. S. 427, 442-443 (1953).
[29] See Munich Re Economic Research, *Insurance Market Outlook*, May 2015.
[30] The term 'London Market' is commonly used to refer to all the international and United Kingdom insurance and reinsurance practitioners based in London.
[31] See http://www.fao.org/3/a-i0744e/i0744e02.pdf visited on October 7, 2015.
[32] G. Gilmore & C. Black, The Law of Admiralty § 2-2, at 54.
[33] *Id.* at 56.
[34] *Standard Oil Company of New Jersey v. United States*, 340 U.S. 54, 59, 1951 AMC 1, 5 (1950)

replaced the duty of utmost good faith with a duty on consumers to take reasonable care not to make misrepresentations when applying for insurance.[35] An insurer may only avoid the policy entirely where the breach of the duty of fair presentation is deliberate or reckless and where the insurer can show that he would not have entered into the contract had he known the information or would only have done so on different terms.[36] If the insurer is unable to show a deliberate or reckless breach, it may only refuse the claim in its entirety and avoid the policy if it can show that he would not have written the policy at all.[37]

The Insurance Act 2015 was enacted on February 12, 2015 (just days after the *San Juan Towing* decision), and becomes effective in August 2016. The *Insurance Act* regulates non-consumer insurance. It will also reform insurance contract law in relation to misrepresentation and non-disclosure, warranties, and remedies for fraudulent claims. The reform will make it harder for insurers to avoid claims as a result of technical breaches by the insured.

The *Insurance Act* places upon the insured a duty to make a fair representation of the risk.[38] This includes requirements to: (1) make a clear and accessible disclosure of every material circumstances which the insured knows or ought to know; (2) disclose sufficient information to put a prudent insurer on notice that it needs to make further enquiries; and (3) ensure that any representations as to a matter of fact are substantially correct.[39] The Act repealed sections 18, 19, and 20 of the Marine Insurance Act 1906 which dealt with disclosures by the insured and representations made while applying for insurance.

These recent paradigmatic changes mark a shift in English insurance law and will justify insurers taking an active role while assessing the risks they underwrite rather than a passive posture in

---

[35] CIDRA § 2(2).
[36] CIDRA § 5, and Schedule 1.
[37] *Id.*
[38] *Insurance Act 2015* § 3(1).
[39] *Id.* at § 3(3).

relying on the insured and its broker to provide all relevant information. Most importantly, insurers may no longer avoid a policy of marine insurance in light of any breach of the duty of utmost good faith since they would have the same remedies provided under CIDRA.

In addition to England, "in the United States and elsewhere the doctrine of utmost good faith is increasingly being questioned or repudiated."[40] Modern state statutory developments and applicable case law have shifted the initial underwriting burden onto the insurer.[41] Most state insurance codes were created to protect the general public from what has been called "adhesionary practices" in consumer insurance policies.[42] In sum, it seems that what has become an entrenched principle of federal insurance law has been slowly but surely rooted out by modern legislation of the states and other nations.

Conclusion

The *uberrimae fidei* doctrine is in fact antiquated. It came about at a time "when sailing ships in faraway seas were insured in London by underwriters who could get no information except from the shipowners."[43] Those days are over. Some argue the doctrine

---

[40] *See* Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. Mar. L. & Com. 1, (1998) citing *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 1991 AMC 2211 (5th Cir.), cert. denied, 502 U.S. 901 (1991) (the principle of utmost good faith is not "entrenched" federal admiralty law); See also *Windsor Mount Joy Mut. Ins. Co. v. Giragosian,* 57 F.3d 50, 1995 AMC 2542 (1st Cir. 1995) ("the sole remaining vestige of the doctrine is in maritime insurance law"); *Mutual & Fed. Ins. Co. v. Oudshoorn Municipality*, (1985) 1 A.D. 429, 433 (S.A. Sup. Ct. App. Div.), (South African court said that the doctrine of utmost good faith is an "alien, vague, useless expression without any particular meaning in law. . . . Our law of insurance has no need for *uberrimae fidei* and the time has come to jettison it."); *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 72 F. 413, 434 (6th Cir. 1896), (held that in non-marine insurance "no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with intent to conceal . . .; that is, unless the nondisclosure was fraudulent.").

[41] 3-16 New Appleman on Insurance Law Library Edition § 16.08

[42] Mitchell J. Popham & Chau Vo, *Misrepresentation and Concealment in Marine Insurance Contracts: An Analysis of Federal and State Law within the Ninth Circuit*, 11 U.S.F. Mar. L.J. 99, 112 (1999).

[43] *Stecker v. American Home Fire Assurance Co.*, 84 N.E. 2d 797, 799 (N.Y. 1949).

no longer has a place in today's insurance market, especially in this day in age where insurers have immediate access to data and they share information about their insureds and claims. It remains to be seen whether the recent insurance law reform in the UK and the modern trends in the insurance markets will be enough for the United States to join the international jettisoning of *uberrimae fidei.*

WEST COAST LONGSHOREMAN STRIKE SYNOPSIS—THE BAD, THE UGLY, AND THE UGLIER*

Jennifer M. Porter
Keesal, Young & Logan
San Francisco, California

In the past decade, U.S. maritime trade has increased from $958 billion in 2004 to $1.75 trillion in 2013.[1] While foreign trade (of which 95% is moved by ships) represented only 13% of the United States' GDP in 1990, it is anticipated to reach 60% by 2030.[2] The infrastructure established to handle the movement of this commerce throughout the U.S. is responsible for creating domestic employment opportunities for an estimated 23.1 million people as well as contributing an additional $3 trillion to the U.S. economy as a result of related-business activities.[3]

The vast majority of the foreign trade coming in and out of the United States is handled by less than fifty commercial ports up and down America's seaboards. The labor force tasked with the effective handling of the cargo shipped through these ports is represented by two formidable unions—the 65,000 member International Longshoremen's Union (ILA),[4] which covers ports along the Atlantic Ocean, Gulf of Mexico and Great Lakes and the 60,000-member International Longshore and Warehouse Union (ILWU),[5] which covers ports along the West Coast and Hawaii.

---

* This paper was first presented as part of the continuing legal education program at the 2015 Fall Meeting in Bermuda.

[1] "Foreign Waterborne Trade by Trading Partner by Value and Metric Tons, 2003–2013," U.S. Census Bureau Foreign Trade Division and World Trade Online data compiled by the U.S. Maritime Association.

[2] "A Vision for the 21st Century," The United States Department of Transportation Maritime Administration, November 2007.

[3] American Association of Port Authorities, "U.S. Public Port Facts," http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=1032, visited September 4, 2015.

[4] http://www.ilaunion.org/ visited on September 4, 2015.

[5] How The Union Works: https://www.ilwu.org/about/how-our-union-works/ visited on September 4, 2015.

Approximately every five years, the collective bargaining agreements governing the longshoreman labor used at these various ports expire and the parties are required to renegotiate the master contracts. During these negotiations, port employers in the twenty-nine major ports along the West Coast are represented by the Pacific Maritime Association (PMA), while the port employers in the fourteen major East and Gulf Coast ports are represented by the U.S. Maritime Alliance (USMX).[6]

Disruptions and delays caused by the negotiations of these contracts can dramatically affect the U.S. economy. During the recent West Coast ILWU-PMA contract negotiations the National Retail Foundation estimated that a lockout or strike of the affected West Coast ports could cost the U.S. economy $2 billion a day.[7]

Under these circumstances, it is imperative that the United States develop a reliable, effective, and timely legal process for handling labor-related disputes between the longshore unions and the shipping companies. This paper will focus on the main sticking points during and the economic consequences of the 2014-2015 West Coast labor contract negotiations as well as various alternative legal procedures being proposed by members of Congress.

ILWU-PMA Contract Negotiations

On July 1, 2014, the six-year master contract between the ILWU and the PMA was set to expire. Even though the parties had begun official negotiations a month before the July 2014 expiration date, by the end of 2014 they were still nowhere near an agreement and alleged longshore slowdowns had created "crisis levels" of congestion at the ports.[8] As a result, the Federal Mediation and

---

[6] Chriss W. Street, "Longshoreman's Union to Strike 29 West Coast Ports," February 6, 2015, http://www.breitbart.com/california/2015/02/06/longshoremans-union-to-strike-29-west-coast-ports/.

[7] National Retail Foundation, "Letter to the President," dated November 6, 2014, http://www.unitedfresh.org/content/uploads/2014/07/Multi-Association-West-Coast-Port-Shutdown-Letter-to-the-President-Final....pdf.

[8] *Id*.

Conciliation Service (FMCS)[9] became involved in the negotiations in early January 2015 to try to assist the parties to reach a resolution.[10] When that did not appear to be working, President Obama dispatched Labor Secretary Thomas Perez to join the negotiations and a tentative agreement was reached on February 20, 2015—almost eight months after the prior labor contract had expired.[11]

The new five-year ILWU-PMA labor contract governs the employment relationship between seventy-one shipping and terminal operations companies and nearly 14,000 longshore, clerk and foreman workers at twenty-nine ports along the West Coast.[12] The contact will apply retroactively to July 1, 2014 and will run through June 30, 2019.[13]

Representatives for both sides explained that the main sticking points during the contractual negotiations were increased wage and benefits, a restructured arbitration system, reform to the employer-paid healthcare system and a revised chassis inspection protocol.[14]

---

[9] As will be discussed in further detail below, the FMCS is an independent agency of the U.S. government created by the National Labor Relations Act, tasked with assisting private party labor disputes. *See* https://www.fmcs.gov/aboutus/our-history/, visited on September 4, 2015.

[10] Harold P. Coxson, "What if the West Coast Ports Shut Down by Lockout or Strike? Is It Time to Invoke Taft-Hartley?," February 10, 2015, http://www.ogletreedeakins.com/shared-content/content/blog/2015/february/what-if-the-west-coast-ports-shut-down-by-lockout-or-strike-is-it-time-to-invoke-taft-hartley.

[11] Elizabeth Weise and Chris Woodyard, "Deal Reached in West Coast Dockworkers Dispute," USA TODAY, February 21, 2015, http://www.usatoday.com/story/news/2015/02/20/west-coast-ports-dispute-union-labor-secretary-tom-perez/23744299/.

[12] *See* Pacific Maritime Association Statement on Final Contract Approvals, May 22, 2015, http://www.pmanet.org/wp-content/uploads/2015/05/PMA-Statement-05-22-2015.pdf.

[13] *Id*.

[14] *Id. See also* Bill Mongelluzzo, The Journal of Commerce, "Management Chief Defends ILWU Contract," dated June 19, 2015, http://www.joc.com/port-news/us-ports/management-chief-defends-ilwu-contract_20150619.html.

1. Increased Longshoremen Wages and Benefits[15]

Prior to the new contract, full-time ILWU workers earned approximately $147,000 in annual base pay, not including health benefits worth $35,000 as well as skill-rate increases, vacation, overtime and holiday pay. In addition, the ILWU workers' pensions were estimated to be worth up to $80,000. The new contract increases the average salary by 3 percent and provides pensions as high as $88,800.

2. Newly Structured Arbitration System for Union-Management Disputes[16]

Under the old contract, each region had a single arbitrator to arbitrate union-management disputes. Historically, the ILWU nominated, and the PMA approved, the regional arbitrators for the ports of Los Angeles-Long Beach and Seattle-Tacoma. The PMA, on the other hand, nominated, and the ILWU approved, arbitrators for the ports of Oakland and Portland, Oregon. Because the ports of Los Angeles-Long Beach and Seattle-Tacoma collectively handle approximately 85% of West Coast trade, the ILWU was long considered to have the upper hand in mid-contract labor disputes.

Under the new contract, each region will have three arbitrators—one nominated by the PMA, one nominated by the ILWU and a third professional arbitrator with no connections to labor or management. When disputes arise, the regional arbitrators will alternate the handling of each dispute and if one of the parties objects to the single arbitrator's decision, the complete three-person panel will convene the next day to make a determination.

---

[15] Carl Horowitz, "New Study Tallies Longshoremen Costs; Calls for Bargaining Alternative," the National Legal and Policy Center, May 18, 2015, http://nlpc.org/stories/2015/05/18/new-study-tallies-longshoremen-costs-calls-bargaining-alternative. *See also* Bill Mongelluzzo, "ILWU Deal Could Hinge on Union's Demand to Fire Local Arbitrator," The Journal of Commerce, February 5, 2015, http://www.joc.com/maritime-news/labor/pma-ilwu-contract-could-hinge-union-wanting-right-fire-local-arbitrator_20150205.html.

[16] Mongelluzzo, "Management Chief Defends ILWU Contract."

3. Reformed Employer-Paid Healthcare System[17]

The new contract maintains the former contractual provision requiring employers to pay 100 percent of the health plan premiums for all ILWU workers. This already costs employers approximately $35,000, while longshoremen pay no co-pays or deductibles for in-network benefits. Now the PMA-employers will also pay the "Cadillac tax" that will take effect on January 1, 2018 under the Affordable Health Care Act. It is estimated that this new Cadillac tax will cost employers an additional $150-180 million a year.

The PMA, however, claims that the new contract will allow employers to take steps to reduce costs by permitting them to more easily reject bills for unnecessary and/or fraudulent medical services to longshoremen. Such costs are presently said to account for approximately $250 million in employer payments a year.

4. Revised Chassis Inspection Protocol[18]

The new contract still permits ILWU mechanics to inspect and if necessary, repair non-motor-carrier-owned chassis but apparently lessens the amount of time it will take to conduct such inspections. The prior contract permitted a ten-point inspection of chassis, which allowed ILWU mechanics to crawl under the chassis and required drivers to get out of the cab during inspections. The new provision calls for a visual, walk-around inspection of the chassis, during which the truck driver may remain in the cab. If on inspection, the ILWU worker decides there is a problem (such as tire pressure, new tires needed, or a repair to the actual chassis), the chassis cannot leave the terminal and has to be repaired by ILWU labor on the terminal.

---

[17] *Id. See also* Mongelluzzo, "ILWU Deal Could Hinge on Union's Demand to Fire Local Arbitrator."

[18] Mongelluzzo, "Management Chief Defends ILWU Contract." *See also* Chris Dupin, "Chassis Lessors Claim ILWU Inspection Agreement Illegal," American Shipper, June 9, 2015, http://www.americanshipper.com/Main/News/Chassis_lessors_claim_ILWU_inspection_agreement_il_60499.aspx?taxonomy=ilwu.

While these new provisions will likely lessen inspection delays, terminals will still be required to store the chassis that are in need of repair and make space for the chassis repair work to take place on their terminal, since moving the chassis offsite would expand the jurisdiction of the ILWU to other facilities. Moreover, as most chassis are owned or leased by third parties not subject to the new ILWU-PMA contract, this provision improperly requires repairs to be made to the chassis without the prior knowledge, consent or supervision of the chassis owner/lessor. Accordingly, the Institute of International Container Lessors (IICL) recently asked the Federal Maritime Commission to find this provision illegal and strike it from the contract.

Economic Consequences Caused by the Prolonged Negotiations

Throughout the nearly ten months of contract negotiations, both terminal operators and labor engaged in various "self-help" tactics to bolster leverage at the bargaining table. By October 2014, the PMA accused the ILWU of purposely reducing crane productivity and engaging in overall "slowdown" in work productivity throughout West Coast ports.[19] On November 3, 2014, the ILWU notified employers in Los Angeles-Long Beach that it would only dispatch thirty-five crane operators a day, as opposed to the usual 110 crane operators a day.[20] Shipping companies responded by halting longshore night shifts beginning in January 2015 and suspending premium-pay working hours over Presidents Day weekend to avoid "paying full shifts of [union] workers such high rates for severely diminished productivity while the backlog of cargo at West Coast ports grows."[21] PMA President James McKenna further threatened that the ports could lockout dockworkers in all terminals along the West Coast within ten days—

[19] Mongelluzzo, "ILWU Deal Could Hinge on Union's Demand to Fire Local Arbitrator."
[20] *Id.*
[21] *See* Pacific Maritime Association Statement on "ILWU Slowdowns Lead to Temporary Suspension of Vessel Operations on Four Weekend, Holiday Dates," February 11, 2015, http://www.pmanet.org/wp-content/uploads/2015/02/PMA-Press-Release-02-11-2015.pdf.

an action that would have likely prompted more direct involvement by and pressure from the federal government. [22]

At the height of the crisis, the Marine Exchange of Southern California confirmed that there were thirty-three cargo ships anchored outside of Los Angeles-Long Beach terminals awaiting cargo operations and the Port of Los Angeles Executive Director Gene Seroka opined that it could take up to three months to clear the backlog.[23] Two months after the tentative agreement had been reached, the average turnaround time for incoming vessels was still over one week.[24] The West Coast port slowdowns were felt in just about every industry across the U.S. For example:[25]

- During the negotiations, 20% of U.S.'s 2015 fresh fruit and vegetable crop exports to Asia were delayed three to four weeks;

- It is estimated that retailers will likely incur $7 billion in costs and losses over the course of 2015 as a result of residual effects from the slowdowns;

- The U.S. meat industry claims to have lost an approximate $85 million every week during the delays; and,

- The U.S. economy posted a 15% drop off in exports during January 2015 compared to the prior January.

Perhaps the industry most adversely affected by the slowdowns, however, are the West Coast ports themselves. Of 138

---

[22] Coxson, "What if the West Coast Ports Shut Down by Lockout or Strike? Is It Time to Invoke Taft-Hartley?"
[23] Andrew Khouri, "Port Dispute: What You Need to Know," LA Times, February 25, 2015, http://www.latimes.com/business/la-fi-port-dispute-qa-20150212-story.html.
[24] Elementum News Desk, "The Real Cost of the West Coast Port Strike, Part 1," April 10, 2015, http://news.elementum.com/the-real-cost-of-the-west-coast-port-strike-pt.-1.
[25] *Id*.

shipping companies polled by the Journal of Commerce in January 2015, 65% were implementing plans to have less cargo activity go through the West Coast in 2015.[26] Indeed, container volumes coming into West Coast ports fell by nearly 18% over the first two months of this year compared to the same time as last year, while container volumes coming into East and Gulf ports grew by 10% during that same time period.[27]

The seemingly inevitable shift of trade to the Gulf and East Coast ports, or more likely, a global shift of avoiding the unreliability and expense of U.S. ports altogether whenever possible, is further fueled by the newly widened Panama Canal, improved ports in Vancouver and Mexico and China's support of a new port and (albeit unlikely) canal in Nicaragua. The fear of the United States potentially losing its toehold as a major powerhouse in the global shipping economy has caused several politicians to call for a major overall of the current legal system governing labor disputes at maritime ports.

The Current System: The National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act (NLRA)[28] expressly granting most employees the legal right to form and join unions and obligating employers to bargain collectively with those unions without government intervention.[29] Some occupations including agricultural laborers, domestic servants, independent contractors, supervisors, railroad workers, airline employees, and public employees were expressly precluded from the NLRA's purview.[30] By expressly limiting the jurisdiction of the NLRA, Congress acknowledged that certain industry labor disputes created too substantial of a risk of harm to the nation that potential government intervention must remain a possibility. To assist with

---

[26] *Id.*
[27] Andrew Khouri, "Imports Plunged at West Coast Ports Amid Labor Dispute," L.A. Times, March 18, 2015, http://www.latimes.com/business/la-fi-west-coast-port-decline-20150317-story.html.
[28] The NLRA was previously referred to as the Wagner Act.
[29] *See generally* 29 U.S.C. §151.
[30] 29 U.S.C. § 152(3).

labor disputes that do fall under NLRA's jurisdiction, a five-member independent agency known as the National Labor Relations Board (NLRB) was created.[31]

In 1947, Congress amended the NLRA to include the Taft-Hartley Act.[32] The Taft-Hartley Act gives the President of the United States the power to enjoin a "threatened or actual strike or lockout affecting an entire industry or substantial part thereof . . . [that] will, if permitted to occur or continue, imperil the national health or safety."[33] If invoked, the President can appoint a board of inquiry to investigate and report the facts of the dispute, but the report cannot include any recommendations or opinions.[34] After receiving the report, the President may instruct the U.S. Attorney General to petition the appropriate federal district court to issue an injunction against the strike or lockout.[35] If the government convinces the court that the threatened or occurring strike/lockout affects an "entire industry or substantial part thereof" and that there is a threat to "national health or safety," court may issue an injunction enjoining the strike or lockout or issue any other order as it sees fit. [36]

If an injunction is granted, an eighty-day cooling off period begins, whereby parties are charged to "make every effort to adjust and settle their differences, with the assistance of the [Federal Mediation and Conciliation Services (FMCS)]."[37] During this time period, the board of inquiry reconvenes and within sixty days of the court's granting of the injunction must issue a report to the President regarding "the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement."[38] This report is made available to the public and the

---

[31] 29 U.S.C. § 153(a-b).
[32] 29 U.S.C. §§ 171-187.
[33] 29 U.S.C. § 176.
[34] *Id.*
[35] 29 U.S.C. § 178(a).
[36] *Id.*
[37] 29 U.S.C. § 179(a).
[38] 29 U.S.C. §179(b).

NLRB, which must "take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer."[39] If the parties still have not come to an agreement at this stage, the President can submit a report to Congress making recommendations for legislative action.[40]

Since its passage in 1947, the Taft-Hartley Act's emergency injunction procedures have been invoked only thirty-six times.[41] Most recently, President Bush used the Taft-Hartley Act in 2002 to end another major West Coast port closure. During the most recent West Coast ports slowdown, several trade associations and House Representatives, including Oregon Rep. Kurt Schrader and Washington Rep. Jaime Herrera-Beutler, pled with President Obama to invoke the Taft-Harley Act to end the prolonged negotiations and slowdowns.[42] President Obama abstained. Indeed, few Democratic presidents have chosen to resort to the remedies of the Taft-Hartley Act, preferring to rely on commercial pressures to force the parties into resolving their disputes.[43]

Thus, several politicians have proposed legal reform of the current system that would ensure a more effective and reliable legal system to govern disputes in the transportation industry.

---

[39] *Id.*

[40] 29 U.S.C. § 180.

[41] Jeanne Cummings, Carlos Tejada and Queena Sook Kim, "Use of Taft-Hartley Act Often Gives Poor Results," The Wall Street Journal, October 4, 2002, http://www.wsj.com/articles/SB1033684691420473913.

[42] *See* Molly Harbarger, "Kurt Schrader, West Coast Legislator Push for Barack Obama to Invoke Taft-Hartley Act if Labor Dispute Continues," The Oregonian, February 12, 2015, http://www.oregonlive.com/business/index.ssf/2015/02/kurt_schrader_west_coast_legis.html.

[43] President Carter was the most recent Democratic President to invoke the Taft-Hartley Act in 1978 in an attempt to stop striking mineworkers during the energy crisis. He was unsuccessful at convincing the court to grant an injunction. *See* Harbarger, "Kurt Schrader, West Coast Legislator Push for Barack Obama to Invoke Taft-Hartley Act if Labor Dispute Continues."

Proposed Legislation to Minimize the Negative Impact of Marine Terminal Labor Disputes

While many commercial and political figures have simply urged the parties to begin contract negotiations well before the expiration of the prior collective bargaining agreement, others believe that a complete overhaul of the remedies provided in the NLRA and the Taft-Hartley Act is necessary.

On June 4, 2015, Senator Cory Gardner (R-Colo.), Senator Lamar Alexander (R-Tenn.) and Senator Roger Wicker (R-Miss.) introduced the Protecting Orderly and Responsible Transit of Shipments ("PORTS") Act (S. 1519), which would amend the Taft-Hartley Act to allow state governors to intervene in port labor disputes rather than being required to rely on the White House to intervene.[44] The bill, which is presently before the Senate Committee on Health, Education, Labor and Pensions, is supported by over one hundred business and trade associations, including the National Retail Federation, Agricultural Transportation Coalition, Consumer Electronics Association, National Association of Manufacturer and the U.S. Chamber of Commerce.[45]

Unlike the present version of Taft-Hartley the proposed bill would amend the act to specifically include slowdowns (which is not defined) as well as strikes and lockouts or the threat thereof. [46] The new bill would permit the use of the Taft-Hartley Act "[w]henever in the opinion of any Governor of a State or territory of the United States, a slowdown, threatened or an actual strike or lock-out, occurring at one or more ports in the United States, is affecting an entire industry or a substantial part thereof. . ."[47] If the U.S.

---

[44] PORTS Act, S. 1519, 114th Cong. (2015-2016).
[45] The Maritime Executive, "Governors to Intervene in Port Labor Disputes," June 8, 2015, http://maritime-executive.com/article/governors-to-intervene-in-port-labor-disputes.
[46] *See* PORTS Act, S. 1519, 114th Cong. (2015-2016).
[47] *Id*.

President declines to act, the state attorney general may petition the appropriate district court for an injunction.[48]

While the PORTS Act is not expected to pass and would likely immediately be subject to challenges by labor interests, critics also reason that it would be equally ineffective as the present system, due to the left-leaning governance on the West Coast and public support for labor unions.[49] Indeed, the current governors in all three West Coast states are Democrats who presumably would resist its use against the ILWU.[50]

On June 18, 2015, Idaho Senator James Risch introduced the Preventing Labor Union Slowdowns Act of 2015 (PLUS Act), S. 1630, to the U.S. Senate.[51] The stated purpose of the proposed act is to "amend the National Labor Relations Act and the Labor Management Relations Act [of] 1947 to deter labor slowdowns at ports of the United States and for other purposes."[52] The bill would affirmatively permit court action in the event of a "labor slowdown" which is defined by the bill to include "any intentional effort by employees to reduce productivity or efficiency in the performance of any duty of such employees; and does not include any such effort required by the good faith belief of such employees that an abnormally dangerous condition exists at the place of employment of such employees."[53] Intentional slowdowns would be considered an unfair labor practice and offending labor organizations would also be subjected to damages claims by injured parties, which could including "reasonable attorneys' fees."[54]

---

[48] *Id.*
[49] Joseph Bonney, "U.S. Senate Bill Would Allow President, Governors to Act against Port Slowdowns," Journal of Commerce, June 5, 2015, http://www.joc.com/maritime-news/labor/us-senate-bill-would-allow-president-governors-act-against-port-slowdowns_20150605.html.
[50] *Id*.
[51] PLUS Act, S. 1630, 114 Cong. (2015-2016).
[52] *Id.*
[53] *Id*.
[54] *Id.*

Interestingly, in the recent West Coast ports slowdown, the ILWU claimed that its drastic decrease in the deployment of crane operators was a result of "safety concerns" based on alleged inadequate training.[55] Thus, under the proposed PLUS Act, labor unions would likely justify any slowdown as being necessary due to some "abnormally dangerous condition." This bill is also presently before the Senate Committee on Health, Education, Labor and Pensions and while less politically charged than the proposed PORTS Act, it is also likely to experience significant opposition to its passage.

Finally, on March 3, 2015, Senator John Thune (R-S. Dakota) suggested that some Congress members are discussing the idea of putting unionized port employees under the purview of the Railway Labor Act (RLA).[56] Congress passed the RLA in 1926 to "avoid any interruption to commerce or to the operation of any carrier engaged therein."[57] While the RLA originally had jurisdiction over just railroad employees, in 1936, it was expanded to cover unionized airlines employees.[58] Under the RLA, union labor contracts do not expire but are amendable and stay in effect until the new contract has been ratified. Thus, during the recent West Coast ports slowdown, under the RLA the prior collective bargaining agreement would have remained in effect and governed the parties' conduct during the nearly ten months of negotiations.

Under the RLA, the National Mediation Board (NMB) was established to "avoid any interruption of commerce" while providing for "the prompt and orderly settlement of all disputes."[59] Unlike the corresponding NLRB set up under the NLRA, the NMB has the authority to intervene in contract negotiation disputes and at

---

[55] Mongelluzzo, "ILWU Deal Could Hinge on Union's Demand to Fire Local Arbitrator."
[56] Mark Szakonyi, "US Senate Leader Floats Putting Port Workers under Railway Labor Act," the Journal of Commerce, March 3, 2015, http://www.joc.com/port-news/longshoreman-labor/us-senate-leader-floats-putting-longshoremen-under-railway-labor-act_20150303.html.
[57] 45 U.S.C. § 151a.
[58] 49 Stat. 1189 (1936).
[59] 45 U.S.C. § 151a (1)(5).

any time during the bargaining process, either party may invoke the NMB's mediation services.[60] Indeed, under the RLA, federal mediation is required before unions or employers can resort to "self-help" tactics such as lockouts or strikes.[61] Once the mediation process begins, the NMB mediator has sole discretion to decide when the parties can discontinue the mediation due to an impasse.[62] If initial mediation does not lead to a settlement, then all parties must adhere to a thirty-day "cooling off" period, during which the prior terms of employment remain in effect.[63]

At any point during the dispute, the NMB can also petition the President of the United States to create a Presidential Emergency Board (BEP) to make recommendations, if the NMB views the dispute to be a threat to the nation's transportation networks.[64] If the parties reject the recommendations published by the BEP, Congress has the option to take action and impose a settlement.[65]

The provisions of the RLA and the work of the NMB have proved to be successful time and again.[66] Since the NMB was founded in 1934, the mediators have had a 97% success rate of all disputes handled and only five work stoppages since 2000.[67] The FMCS, on the other hand, has only had an 84-87% success rate over

---

[60] 45 U.S.C. § 155.
[61] ABA, "Negotiation of Collective Bargaining Agreements," in The Railway Labor Act, pp. 241-242.
[62] ABA, "Selecting a Bargaining Representative," in The Railway Labor Act, pp. 128-129.
[63] 45 U.S.C. §155, First.
[64] 45 U.S.C. §160.
[65] Alexandra Hegji, "Federal Labor Relations Statutes: An Overview," Congressional Research Service, November 26, 2012, https://www.fas.org/sgp/crs/misc/R42526.pdf.
[66] *See* Diana Fuchtgott-Roth, "Held Hostage—U.S. Ports, Labor Unrest and the Threat to National Commerce," E21 Issue Brief, No. 4, April 2015, http://www.manhattan-institute.org/html/e21_04.htm#.VfCT-8uFP5o.
[67] Eileen Hennessey, Counsel Office of Legal Affairs, "An Overview of the National Mediation Board," October 1, 2007, http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/115.authcheckdam.pdf

the last decade.[68] As an example of the RLA's success, President Obama recently resolved a national railway dispute after appointing a BEP to issue recommendations. After the NMB was unable to resolve the parties' differences, the President issued an Executive Order on October 6, 2011 appointing a PEB to review the dispute which was between five major railroads and 90,000 employees and had begun in November 2009.[69] On November 5, 2011, the PEB's proposed resolution was approved by both sides and the dispute was resolved without any disruption to transportation. [70]

Unlike the maritime industry during the recent West Coast ports slowdown, the railroad industry was able to avoid major media coverage and any disruption to the nation's transportation networks. With new global competition from other maritime nations and the U.S. economy's growing reliance on both imports and exports, an effective and reliable legal system overseeing marine terminal employment relations is more important now than ever before.

---

[68] In 2013, the FMCS only had a 76.6% success rate for disputes involving contracts covering more than 1,000 workers. *See* Joseph Bonney, "Q&A: Federal Mediation and the PMA-ILWU Contract," Journal of Commerce, January 6, 2015, http://www.joc.com/port-news/longshoreman-labor/international-longshore-and-warehouse-union/qa-federal-mediation-and-pma-ilwu-contract_20150106.html.

[69] The White House Executive Order No. 13586 "Establishing an Emergency Board to Investigate Disputes Between Certain Railroads Represented by the National Carriers' Conference Committee of the National Railway Labor Conference and Their Employees Represented by Certain Labor Organizations," dated October 6, 2011, Fed. Register, Vol. 76, No. 197.

[70] Report to the President by Emergency Board No. 243, dated November 5, 2011, http://www.ibew.org/Portals/31/documents/railroad/PEB%20243%20Final%20Report.pdf

RECENT DEVELOPMENTS IN MAINTENANCE AND CURE*

Aaron B. Greenbaum, Esq.[1]

I. Introduction

This article discusses noteworthy decisions concerning maintenance and cure issued between September 1, 2014 and September 30, 2015. The selection of cases included in this article reflects trends in the law, including examination of the effects of bankruptcy, application of the collateral source rule, analysis of when maximum medical improvement is reached, application of the borrowed servant doctrine, affirmation of the *McCorpen* defense, and the awarding of punitive damages post-*Townsend*.

II. Ongoing Nature of Maintenance and Cure Obligation

In *Arctic Storm, Inc. v. Madrid*, [2] a fire broke out in the engine room of a vessel while its crewmembers were onboard, prompting them to evacuate. The following day, the crewmember-claimants signed a form denying that they had been injured or had fallen ill in the service of the vessel. One month following the incident, the crewmember-claimants informed the vessel owner that they were seeking and were scheduled to receive treatment for psychological injuries they had suffered as a result of the fire.[3]

The vessel owner did not pay maintenance for the 38 days from the date of the incident through the claimants' first

---

[1] Aaron Greenbaum is a founding member of Pusateri, Barrios, Guillot & Greenbaum, LLC, in New Orleans, Louisiana. He is a graduate of Tulane University Law School. His practice focuses on brown water and blue water admiralty and maritime issues, including personal injury and maintenance and cure.

The materials forming the basis of this article were originally presented at the Fall 2015 meeting of The Maritime Law Association of the United States.

[2] *Arctic Storm, Inc. v. Madrid*, 2015 U.S. Dist. LEXIS 102323, at *2 (W.D. Wash. May 22, 2015).

[3] *Id*.

appointment with their treating psychologist and did not initiate maintenance and cure benefits for several months following the incident.[4] The vessel owner took the position that it was obligated to pay maintenance and cure *only* covering dates for which "it knew the claimants were still receiving treatment," and that it reasonably waited until it received medical records confirming dates of the counseling sessions before providing benefits covering the time leading up to and including these dates.[5]

The court rejected the vessel owner's arguments, holding that a seaman is not obligated to supply updated records before receiving each new installment of maintenance. "A shipowner cannot withhold maintenance where the records in its possession indicate that the seaman's treatment is ongoing and curative."[6] The court ordered the vessel owner to pay back maintenance, holding that the fire was the "triggering" event for commencement of the maintenance and cure obligation.[7] The court further ordered the vessel owner to pay maintenance on a regular, two-week schedule going forward.[8] The court also held that the crewmembers' claims for punitive damages could proceed to the trier of fact.[9]

III. The Collateral Source Rule

In *Blanchard v. United States*, [10] the plaintiff was injured while working as a deckhand on a pushboat located on the Atchafalaya River, when the wake from a passing U.S. Army Corps of Engineers' vessel rocked the pushboat, causing plaintiff to fall and injure himself. The plaintiff's employer filed a cross-claim against the United States seeking indemnity for any maintenance and cure benefits paid or to be paid to the plaintiff.[11] After trial on

---

[4] *Id.*
[5] *Id*. at *2-3.
[6] *Id*. at *11 (citing *Boyden v. Am. Seafoods Co.*, 2000 AMC 1512 (W.D. Wash. Mar. 21, 2000)).
[7] *Id*. at *13.
[8] *Id*. at *14.
[9] *Id*. at *12.
[10] *Blanchard v. United States*, 2014 U.S. Dist. LEXIS 131958, at *2, 2014 AMC 2888 (W.D. La. Sept. 19, 2014).
[11] *Id*. at *2.

the merits, the court assigned the United States 100% fault for the incident.[12] Damages were awarded in the amount of $585,784.06, plus post-judgment interest. Of that total, the parties stipulated that $42,794.44 was for past medical expenses.[13] The plaintiff's employer sought recovery from the United States for maintenance and cure payments made to the plaintiff in the stipulated amount of $104,550.36, plus post-judgment interest.[14]

The United States contended that it was being required to pay the plaintiff's medical expenses twice—once to the plaintiff and once to the employer.[15] The court held that the collateral source rule applied, reasoning that by strict application of the collateral source rule, the United States as the tortfeasor, would not be able to reduce the damages it owed to the plaintiff by the amount of those medical payments. "The outcome would be no different if the plaintiff had received worker's compensation benefits or private health insurance benefits instead of cure."[16] The United States did not contest that proposition, or the proposition that an employer could recover maintenance and cure payments "from a third-party whose negligence partially or wholly caused the seaman's injury."[17] Rather the United States argued that it was paying for the same damages twice, and in doing so, the result would run afoul of the policy to avoid "overdeterrence and overcompensation."[18]

The Court rejected the United States' argument. Because the plaintiff and its employer had "separate and independent losses," the United States, as the sole-fault tortfeasor, was not "paying twice for the same injury."[19] Rather, the United States would "pay once, for two separate injuries . . . which happen to be in the same amount."[20]

---

[12] *Id*. at *2-3.
[13] *Id*. at *3.
[14] *Id*.
[15] *Id*. at *4.
[16] *Id*. at *7.
[17] *Id*. at *8 (citing *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1013 (5th Cir. 1994)*; Savoie v. LaFourche Boat Rentals*, 627 F.2d 722, 723 (5th Cir. 1980); *Adams v. Texaco, Inc.,* 640 F.2d 618, 620 (5th Cir. 1981)).
[18] *Id*. at (*Davis v. Odeco, Inc.,* 18 F.3d 1237, 1244 n. 21. (5th Cir. 1994)).
[19] *Id*. at *14.
[20] *Id*. (citing *Jones v. Waterman S.S. Corp.*, 155 F.2d 992 (3rd Cir. 1946); *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir.1994)).

Although the court acknowledged that the result "may be troubling," "the collateral source rule is clear, as is the maintenance and cure recovery provision, and given the priority afforded to the policy that the tortfeasor should bear the responsibility for its conduct the Court finds no basis for deviation from either rule."[21]

IV. Procedure for Compelling Maintenance and Cure

The issue in *Helix Energy Solutions Group, Inc. v. Howard*, [22] was whether a seaman could compel his employer to institute maintenance and cure benefits by filing a "motion to compel," rather than filing a Motion for Summary Judgment or seeking a determination on the merits of his maintenance and cure claim. The Texas state trial court had granted the seaman's "motion to compel" and ordered the employer to institute maintenance and cure payments going forward. The employer appealed, arguing that the trial court had issued a temporary injunction in violation of the requirements of Texas Rule of Civil Procedure 683. The Texas Court of Appeals agreed and vacated the trial court's order.[23]

The court held that state law, rather than federal law, applied to the procedural question of whether a claim for maintenance and cure could be decided by the court on a "motion to compel."[24] Because the trial court's order required the employer to perform certain actions—specifically, to make continuing payments to the plaintiff—it was a "classic example of a mandatory injunction."[25]

Texas Rule of Civil Procedure 683 requires that an injunction set forth the reasons for its issuance, be specific in terms, describe in reasonable detail the acts to be restrained, and "include an order setting the cause for trial on the merits with respect to the ultimate relief sought."[26] Although the trial court's order failed to

---

[21] *Id*. at *14-15.
[22] *Helix Energy Solutions Group, Inc. v. Howard,* 452 S.W.3d 40 (Tex. App. Houston-14th Dist. 2014). The plaintiff did not seek relief in the form of filing a Motion for Summary Judgment or by requesting a trial on the merits of his maintenance and cure claim.
[23] *Id*. at 42.
[24] *Id*. at 43-44.
[25] *Id*. at 44.
[26] *Id*. (citing Tex. R. Civ. Pro. 683).

comply with any of these requirements, the plaintiff argued that the trial court "arrived at the correct result" under federal maritime law.[27] The appellate court found the trial court's order void for failure to comply with Texas Rule of Civil Procedure 683.[28] Therefore the appellate court could not address the plaintiff's arguments that he was entitled to maintenance and cure under federal maritime law.[29] It appears that the proper procedural vehicle to seek institution of maintenance and cure, at least under Texas state law, is to file a Motion for Summary Judgment or seek a determination on the merits at a bench trial.

V. The Automatic Bankruptcy Stay

In *Bratkowski v. Cal Dive Int'l, Inc.*, [30] the plaintiff sued his employer in the U.S. District Court for the Eastern District of Louisiana for Jones Act negligence, as well as under the general maritime law for unseaworthiness and for maintenance and cure. One month after the plaintiff filed suit, the defendant-employer filed a Voluntary Petition for Chapter 11 Bankruptcy in the U.S. Bankruptcy Court for the District of Delaware, thereby invoking the protections of the automatic bankruptcy stay under 11 U.S.C. § 362(a).[31] In the bankruptcy court, the plaintiff filed a Motion to Lift the Automatic Stay of the proceedings, including with respect to his maintenance and cure claims.[32] The employer then filed a Motion to Stay the Proceedings in the district court in light of the bankruptcy proceeding pending in Delaware.[33]

According to the plaintiff's pleadings in the district court, he was receiving curative treatment for his lower back and had not yet reached maximum medical improvement. However, his

---

[27] *Id*. at 44-45.
[28] *Id.* at 45.
[29] *Id*.
[30] *Bratkowski v. Cal Dive Int'l, Inc.*, 2015 U.S. Dist. LEXIS 51643, at *1-2 (E.D. La. Apr. 20, 2015).
[31] *Id*. at *2.
[32] *Id.*
[33] *Bratkowski*, 2015 U.S. Dist. LEXIS 51643, at *2-3.

maintenance and cure benefits were "prematurely terminated" shortly following the employer's filing of bankruptcy.[34]

The district court declined to delay its ruling on the employer's Motion to Stay until the Motion to Lift the Stay (pending in bankruptcy court) had been resolved.[35] The district court also declined to hold that the automatic stay did not apply to an injured seaman's claims for maintenance and cure, holding that the "automatic stay that is already in effect by operation of 11 U.S.C. § 362 has suspended this Court's authority to continue the judicial proceedings pending against the debtor."[36] The court ruled that the plaintiff could seek relief from the district court if the bankruptcy court lifted the stay.[37] The district court's decision appears limited to whether it (as opposed to the bankruptcy court) had the "authority" to lift or disregard the stay as it concerned the plaintiff's maintenance and cure claims. The district court noted, however, that the duty "to pay maintenance and cure continues even after a shipowner declares bankruptcy."[38]

VI. Direct Actions against Insurers

In *Bratkowski v. Cal Dive Int'l, Inc.*, [39] following the employer-defendant's filing of a Chapter 11 bankruptcy proceeding, the plaintiff brought suit against the defendant's liability insurer, Aspen Insurance UK Limited, pursuant to the Louisiana Direct Action statute. The insurer filed a Motion for Summary Judgment seeking the dismissal of all claims against it, including plaintiff's claims for maintenance and cure.[40] Specifically, it argued that the

---

[34] See *Bratkowski v. Cal Dive Int'l, Inc.*, civ. no. 2:15-00294, U.S District Court for the Eastern District of Louisiana, Rec. Doc. 18.
[35] *Bratkowski*, 2015 U.S. Dist. LEXIS 51643, at *3.
[36] *Id.* at *3-4.
[37] *Id.* at *4. Approximately one month after the district court's decision, the parties entered into a stipulation in the bankruptcy court regarding lifting the stay. *In re Cal Dive International, Inc. et al*, case no. 15-10458, U.S. Bankruptcy Court for the District of Delaware, Rec. Doc. 395-1.
[38] *Bratkowski*, 2015 U.S. Dist. LEXIS 51643, at *4 fn. 3 (citing *Matter of Sea Ray Marine Services, Inc.*, 105 B.R. 12, 13 (Bankr. E.D. La. 1989).
[39] *Bratkowski v. Aspen Ins. UK, Ltd.*, 2015 U.S. Dist. LEXIS 78536, at *1, 2015 AMC 1567 (E.D. La. Jun. 17, 2015). See also Louisiana's Direct Action statute. La. R.S. § 22:1269.
[40] *Bratkowski*, 2015 U.S. Dist. LEXIS 78536, at *3.

policies of insurance were issued and delivered in Houston, Texas, not Louisiana, and that the accident sued upon occurred on the high seas on a vessel located on the Outer Continental Shelf, not within the territorial waters of the State of Louisiana.[41]

The Louisiana Direct Action Statute permits an action against an insurer of a tortfeasor if the plaintiff can establish that (1) the accident or injury occurred in Louisiana, (2) the policy was written in Louisiana, or (3) the policy was delivered in Louisiana.[42] It was undisputed that the accident giving rise to the Jones Act and unseaworthiness claims occurred on the OCS, not in Louisiana. Thus, the court granted the insurer summary judgment with respect to those claims.[43] However, the court denied the insurer's request for summary judgment as to the maintenance and cure claims, holding that genuine issues of material fact remained as to whether the failure to pay maintenance and cure resulted in an injury that "occurred in Louisiana."[44]

VII. The Borrowed Servant Doctrine

Who is the seaman's employer for the purposes of the maintenance and cure obligation—a staffing agency or the vessel owner? In *In re Weeks Marine*, [45] a staffing agency, Aerotek, Inc. brought a Motion for Summary Judgment, seeking a determination that the plaintiff-seaman was a "borrowed servant" of Weeks Marine, and, therefore, that Aerotek was entitled to terminate maintenance and cure benefits.

Weeks had entered into a contract with Aerotek, a staffing service agency, in which Aerotek would provide supplemental staffing of workers for Weeks.[46] The plaintiff signed an Employment Agreement with Aerotek in which he agreed to be

---

[41] *Id*. at *5-6.
[42] *Bratkowski*, 2015 U.S. Dist. LEXIS 78536, at *6 (citing *Grubbs v. Gulf International Marine Inc.*, 13 F.3d 168, 170 (5th Cir. 1994)).
[43] *Id*.
[44] *Id*. at *6-7.
[45] *In re Weeks Marine, Inc.*, 2015 U.S. Dist. LEXIS 8489, *3, 2015 AMC 507 (M.D. La. 2015).
[46] *Id*..

assigned to work as a crane operator for Weeks.[47] He was subsequently injured onboard Weeks' vessel and Aerotek initially paid him benefits.[48]

The district court applied the nine factor "borrowed servant" test set forth by the U.S. Circuit Court of Appeals for the Fifth Circuit in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), finding that the plaintiff was a borrowed servant of Weeks.[49] Accordingly, Aerotek's maintenance and cure obligation was terminated, and Weeks was ordered to pay maintenance and cure going forward.[50]

VIII. Maximum Medical Improvement

In *Hedges v. Foss Mar. Co.*, [51] the plaintiff had undergone five surgeries for his lower back since his accident and continued to suffer from ongoing lower back pain and disability. His treating physician recommended that he undergo a surgical implant of a trial, spinal cord stimulator.[52] The plaintiff then sought an order compelling the employer to pay for the surgery under the cure obligation.[53]

The court described a spinal cord stimulator as "an implanted, programmable neurotransmitter that interrupts pain signals to the brain by delivering small electrical impulses to the spinal column through stimulation leads."[54] Plaintiff's treating physician initially stated that the implant was "non-curative," but later rescinded his use of the term, claiming that he was unaware of its legal meaning.[55] The employer's medical expert stated that the

---

[47] *Id*.
[48] *Id*.
[49] *Id*. at *16.
[50] *Id*. at *5, 18 (citing *Hall v. Diamond M. Co*., 732 F.2d 1246, 1249 (5th Cir. 1984); *Baker v. Raymond International*, 656 F.2d 173, 178 (5th Cir. 1981)).
[51] *Hedges v. Foss Mar. Co.*, 2015 U.S. Dist. LEXIS 10510, *1-2 (W.D. Wash. Jan. 29, 2015).
[52] *Hedges*, 2015 U.S. Dist. LEXIS 10510, at *1-2.
[53] *Id.*
[54] *Id*. at *2.
[55] *Id*. at *3.

stimulator was a palliative technique that did not address the cause of the patient's pain.[56]

The court held that "[e]ven if the distinction between curative and palliative treatment is relevant before maximum cure has been reached, cure includes all treatment that improves function. A treatment is curative even if the increased function is accomplished primarily through pain relief."[57] The employer was therefore ordered to pay for the stimulator implant under the cure obligation.[58]

IX. Application of the *McCorpen* Defense

In *McCorpen v. Central Gulf Steamship Corp.*, [59] the U.S. Court of Appeals for the Fifth Circuit held that a seaman who "knowingly fails to disclose a pre-existing physical disability during his or her pre-employment physical examination" may not recover maintenance and cure." In order to establish a *McCorpen* defense, an employer must show that (1) the claimant intentionally misrepresented or concealed medical facts; (2) the non-disclosed facts were material to the employer's decision to hire the claimant; and (3) a connection exists between the withheld information and the injury complained of in the lawsuit.[60]

In *Meche v. Doucet*, the U.S. Court of Appeals for the Fifth Circuit reversed the district court's denial of the *McCorpen* defense and vacated the award of punitive damages for failure to pay maintenance and cure.[61] The plaintiff had aggravated a pre-existing condition in his lumbar spine while in the service of the vessel, but had concealed the condition during the pre-employment process.[62] Although the plaintiff's current employer (Key) did not subject him

---

[56] *Id*. at *3-4.
[57] *Id*. at *7.
[58] *Id*. at *7-8.
[59] *Meche v. Doucet*, 777 F.3d 237, 244 (5th Cir. 2015) (citing *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547, 548 (5th Cir. 1968)).
[60] *Id*. at 244-45 (citing *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 171 (5th Cir. 2005)).
[61] *Id*. at 249
[62] *Id*. at 241.

to a pre-employment examination or interview, Key's predecessor did, and Key was thereafter entitled to rely on the plaintiff's representations.[63] Therefore, the objective, "intentional concealment standard" applied to the *McCorpen* analysis.[64]

The Court rejected the plaintiff's argument that he did not conceal his medical history because he did not personally complete the medical questionnaire.[65] The plaintiff claimed that his niece had completed the questionnaire and he had simply signed it without first reading it. He also claimed that he had verbally notified his employer of his past injuries after completing the questionnaire. The court held that "if a seaman intentionally provides false information on a pre-employment medical questionnaire and certifies that the information therein is true and correct, that seaman may not later argue that his concealment was not intentional based on his statement, which the employer disputed, that he verbally disclosed medical information that contradicted the written questionnaire."[66]

The district court decision in *Bosarge v. Cheramie Marine LLC,* [67] seemingly came to the opposite conclusion of the Fifth Circuit in *Meche*. Here, the defendant sought to invoke the *McCorpen* defense where the plaintiff suffered a back injury prior to the incident at issue and he did not disclose that injury on the medical questionnaire he was provided prior to his employment with the defendant. Prior to his employment, the plaintiff visited an orthopaedic clinic complaining of lower back pain. [68] He was diagnosed with lumbar degenerative disk disease and given a physical therapy home exercise program and pain medicine, which prescription he thereafter filled twice.[69]

The district court denied the employer's Motion for Summary Judgment on the *McCorpen* defense. It held that genuine

---

[63] *Meche*, 777 F.3d at 246.
[64] *Id*.
[65] *Id*. at 247-48.
[66] *Id*. at 248.
[67] *Bosarge v. Cheramie Marine LLC*, 2015 U.S. Dist. LEXIS 101768, at *7 (E.D. La. Aug. 4, 2015).
[68] *Id.* at *7.
[69] *Id*.

bissues of facts existed as to whether the concealed information would have affected the employer's decision to hire the plaintiff, as his prior injury was "extremely minor" and that the "plaintiff had subsequently been cleared for full work duty by a *prior* employer."[70] Specifically, the court relied on MRI results from a prior employer in 2013 that were returned normal, clearing plaintiff to work full duty.[71]

In *Foret v. St. June*, [72] the district court applied the *McCorpen* defense, notwithstanding that the fact that the plaintiff was not required to complete a pre-employment medical questionnaire or undergo a pre-employment physical. The plaintiff, who injured his back, argued that he did not conceal information regarding his pre-existing injuries because he voluntarily informed the employer that he had previously had neck and shoulder surgery. [73] However, the plaintiff remained silent regarding his pre-existing back injuries.[74] "More importantly," the plaintiff told his employer that he was "healed" at the time of the interview, which was "entirely inconsistent" with his medical history.[75] Because the employer showed that plaintiff knew that the disclosure of his pre-existing back and neck injuries was "plainly desired" by the employer and the plaintiff had "intentionally concealed and misrepresented the existence and extent of these injuries," the first prong of the *McCorpen* defense was satisfied.[76]

X. Punitive Damages

In *Campbell v. Offshore Liftboats*, *LLC*, [77] the plaintiff made a claim for punitive damages, alleging that the defendant had delayed its maintenance and cure investigation and failed to pay him a proper rate of maintenance. The court disagreed and granted the

---

[70] *Id.* at *9 (emphasis added).
[71] *Id.* at *9-10.
[72] *Foret v. St. June, LLC*, 2014 U.S. Dist. LEXIS 127317, at *8-9 (E.D. La. Sept. 11, 2014).
[73] *Id.* at *10.
[74] *Foret*, 2014 U.S. Dist. LEXIS 127317, at *10.
[75] *Id.* at *10-11.
[76] *Id.* at *11. The second and third prongs of the *McCorpen* defense were also satisfied.
[77] *Campbell v. Offshore Liftboats, LLC*, 2015 U.S. Dist. LEXIS 34981, 2015 AMC 1075 (E.D. La. Mar. 20, 2015).

defendant's Motion for Summary Judgment, dismissing the punitive damages claim.[78] Upon receipt of the plaintiff's maintenance and cure demand, the defendant began an investigation into his work history and the applicable law to determine, first, whether the plaintiff was a seaman under the Jones Act entitled to such payments, and second, the appropriate rate of compensation without proof of the food, lodging, or medical expenses incurred by plaintiff.[79] The defendant instituted maintenance and cure payments within ten business days, which the court found to be a reasonable amount of time to conduct a "diligent" investigation.[80] Furthermore, absent any supporting documentation provided by the plaintiff as to his daily expenses, $35 per day was a reasonable maintenance rate within the Fifth Circuit.[81] Citing lack of any proof, the court also rejected plaintiff's contention that his punitive damages claim should have been maintained on the basis that the defendant might one day, in bad faith, terminate the maintenance and cure payments before he reached maximum medical improvement.[82]

In *Hicks v. Tug Patriot*,[83] the U.S. Court of Appeals for the Second Circuit affirmed a decision that a shipowner was liable for punitive damages when it prematurely terminated maintenance and cure benefits. The plaintiff injured his shoulder in the service of the vessel and subsequently underwent surgery.[84] The shipowner hired a private investigator, who videotaped the plaintiff planting a small tree and playing with his grandson.[85] When the plaintiff's doctor requested authorization for an additional MRI scan, he was shown this footage and a document detailing the purported physical requirements of the plaintiff's job.[86] Based on this video and the apparently false suggestion by the shipowner that the plaintiff's job required only light lifting, the doctor determined that the plaintiff was fit for duty. The shipowner then terminated his maintenance and

---

[78] *Id.* at *10.
[79] *Id*. at *8-10.
[80] *Id*. at *10.
[81] *Id*. at *9.
[82] *Id*. at *10.
[83] *Hicks v. Tug Patriot*, 783 F.3d 939, 941 (2d Cir. 2015).
[84] *Id*. at 941.
[85] *Id*.
[86] *Hicks*, 783 F.3d at 941.

cure benefits. Appellant accordingly informed Hicks that it would terminate maintenance and cure payments effective May 9, 2010.[87]

Several months later, the plaintiff sought continuing care from a second doctor, who diagnosed a recurrent rotator cuff tear.[88] Ultimately, the doctor recommended another surgery plus six months of rehabilitation to repair the additional damage.[89] Under financial pressure caused by the "meager maintenance" of $15.00 a day paid to the plaintiff, which was terminated, the plaintiff returned to work while still injured.[90] Severe financial difficulties caused him to miss some of his physical therapy appointments.[91] His house was put into foreclosure and he was unable to pay for health insurance.[92]

The jury found that appellant's failure to pay maintenance and cure was unreasonable and willful and awarded $123,000 in punitive damages.[93] Based on the finding of willfulness, the district court, upon a motion under Fed. R. Civ. P. 54(d), granted the plaintiff an additional $112,083.77 in attorney's fees.[94] The Second Circuit affirmed the decision, diverging from prior precedent and holding that the amount of recoverable punitive damages is *not* limited to the amount of reasonable attorney's fees, which are available when the refusal to pay maintenance is "willful."[95]

Following a bench trial, the district court in *Jefferson v. Baywater Drilling*,[96] awarded punitive damages where the defendant had performed an unreasonable and inadequate maintenance and cure investigation, prior to denying benefits. The plaintiff had developed a disabling skin condition while working as

---

[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*. at 943 (overruling *McMillan v. Tug Jane A. Bouchard*, 885 F. Supp. 452, 466 (E.D.N.Y. 1995); *Kraljic v. Berman Enter., Inc.*, 575 F.2d 412, 415-16 (2d Cir. 1978)).
[96] *Jefferson v. Baywater Drilling, LLC*, 2015 U.S. Dist. LEXIS 9314, at *20 2015 AMC 571 (E.D. La. Jan. 27, 2015).

a seaman aboard the defendant's vessel.[97] The shipowner's human resources manager conducted the maintenance and cure investigation, which consisted of speaking with plaintiff's coworkers and reviewing incident reports.[98] The shipowner ultimately concluded that the plaintiff's injuries were caused by a pre-existing condition related to herpes or a reaction to the medicine he allegedly brought aboard the vessel.[99] There was no further investigation of plaintiff's claims, the shipowner did not review the plaintiff's medical records, and the shipowner did not request that the plaintiff be tested for herpes or that any tests be done to establish a connection between the plaintiff's skin condition and the medication he allegedly brought to work.[100]

The court found the maintenance and cure investigation was "impermissibly lax."[101] The denial of maintenance and cure was "arbitrary and capricious" and the plaintiff was entitled to compensatory damages, punitive damages, and attorneys' fees.[102] The court awarded $10,000 in punitive damages.[103]

These decisions demonstrate that maintenance and cure obligations continue to be taken very seriously by the courts. Counsel for seafarers, employers, and vessel owners should be cognizant of recent decisions affecting maintenance and cure.

---

[97] *Id.* at *1.
[98] *Id*. at *9.
[99] *Jefferson*, 2015 U.S. Dist. LEXIS 9314, at *9.
[100] *Id*.
[101] *Id.* at *16.
[102] *Id.* at *17-18.
[103] *Id.* at *18.

E-DISCOVERY, FACEBOOK SHENANIGANS, AND FRAUD:

THE *CROWE V. MARQUETTE TRANSPORTATION* CASE*

By Marissa M. Henderson[1]

Introduction

Social media is everywhere—Facebook, Twitter, LinkedIn, Instagram, Pinterest, Snapchat, Periscope,[2] the list is seemingly ever-growing. The Millennial generation, especially, post, text, and message on multiple platforms as their preferred means of communication. But social media's impact goes beyond personal lives. It impacts the practice and business of law and lawsuits. This article examines how social media can impact legal cases, especially maritime personal injury actions. This article will use one recent and particularly interesting case from New Orleans as a case study.

Two things that this article will touch upon and that should give readers food for thought in their practice are: (1) the nuts and bolts of how to use discovery to get at social media accounts, including overcoming common objections; and (2) ethical ramifications, such as whether there is an ethical duty to advise clients of social media in litigation.

---

[1] Marissa M. Henderson is a partner at Ventker Warman Henderson in Norfolk, Virginia. She is a graduate of the University of Virginia, both for her undergraduate degree and law school. Her practice focuses on maritime litigation matters and other commercial disputes and litigation. She is licensed in both Virginia and North Carolina.

(This paper was first presented at the 2015 Fall Meeting of The Maritime Law Association of the United States in Bermuda.)

[2] Periscope, owned by Twitter, Inc., is a "hot" new app designed to let you see the world through someone else's eyes. Users can post *live* video feed either to the public or to an invited group, replayable for 24 hours. *See* I-Tunes App store, Periscope app, available at *https://itunes.apple.com/us/app/periscope/id972909677?mt=8.*

The *Crowe* Case: What Not to Do

Crowe v. Marquette Transportation[3] started out as a typical seaman's case for negligence under the Jones Act, with maintenance and cure and unseaworthiness claims also asserted. The plaintiff, Brannon Crowe, a Millennial-generation tug deckhand, claimed he injured his knee while moving a heavy pump off a tugboat, the LADY GUADALUPE, to the dock while standing on the vessel's bull rail. His liability theories essentially relied on his claim non-skid material was not adequately applied to the bull rail. He filed suit in May 2014 in the United States District Court for the Eastern District of Louisiana against his employer, Marquette Transportation Company Gulf-Inland, LLC ("Marquette").

Early in discovery, Marquette served a broad request for production on Crowe, seeking "an unredacted, unedited digital copy of your entire Facebook page" since he began work with Marquette. The discovery request even included instructions on how to get it, stating Facebook provides instructions and a simple way to "download a copy of your Facebook data." Crowe objected to this request as overly broad, unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence—the usual objections to social media discovery requests. Crowe's answer to this request also stated: "[P]laintiff does not presently have a Facebook account."

Marquette did not initially push the written discovery request at that time, though it did ask Crowe about his Facebook use in deposition. Crowe testified he had recently "eliminated" his Facebook account. Marquette then moved to compel its Facebook page discovery request.[4] In support of its motion, Marquette submitted a mobile phone's screen shot of what appears to be a Facebook text message exchange between another deckhand on the LADY GUADALUPE, Robert Falsev, and someone with the user

---

[3] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130 (E.D. La. filed May 19, 2014) (Englehardt, C.J.).

[4] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 16 (E.D. La. filed December 18, 2014).

name "CroWe."[5] In this exchange, CroWe stated he "got hurt before [he] got on the boat" and asked Falsev to say the captain told them to put nonskid on the bulwarks. Crowe opposed the motion to compel, arguing Marquette was on a fishing expedition; alternatively, he sought an *in camera* review of his Facebook account. Crowe also claimed in briefing his Facebook account had been "hacked," and he did not have a capital "w" in his last name. In the same motion, Marquette also moved to compel a forensic exam of Crowe's phone. The court ordered Crowe to provide his entire Facebook history for an *in camera* inspection.

Crowe's lawyers submitted some 4,000 pages of Crowe's Facebook account history. After conducting just a cursory *in camera* review, Magistrate Judge Michael North issued an order to produce the entire 4,000 pages to the defense. Judge North's sternly-worded order noted it was "patently clear from even a cursory review that this information should have been produced as part of Crowe's original response."[6] The judge was not amused to learn Crowe's Facebook account was deactivated just *four days* after the written discovery request for his Facebook account was served. Clearly, one of the reasons the judge ordered production of the Facebook account was because Crowe had rather obviously (and clumsily) tried to hide it from the opposing side. Other facts—illustrating Crowe's deception and games with the lawsuit—seemed to trouble the court in its order. For example, Judge North noted Crowe's Facebook account was reactivated just a week before the account data was required to be produced to the court, and it was done from the same iPhone Crowe had regularly used to access Facebook previously. It certainly appeared that the plaintiff was playing games with the discovery process.

---

[5] The screenshot of the Facebook message exchange is in the court's record at Document Number 16-3.

[6] The order appears in the court's record at Document Number 32, filed on January 20, 2015.

Deactivation versus Deletion—A Critical Distinction on Facebook

In his order compelling production of the plaintiff's entire Facebook record, Judge North was further "troubled" by Crowe's discovery answer that he did not "presently have a Facebook account." The judge noted Crowe had only deactivated his account but had not deleted it. The order then quotes from Facebook's technical pages that explain the difference between deactivation and deletion of an account. As the order noted, deactivation makes a Facebook profile not visible to other users, but *all* the content is retrievable and can be reactivated *at any time*. Deactivation on Facebook is akin to going off-line for a time. Crowe went off-line as soon as his Facebook page became an issue in his lawsuit. Ironically, Crowe's attempt to keep his social media account out of discovery was thwarted by his own clumsy attempts to hide his account from the litigation.

Court Orders Jailbreak of Plaintiff's Mobile Phone– Text, Text, and More Texts

The court further punished Crowe for playing discovery games with his electronic communications. The same order giving the defense full access to his Facebook account allowed an intrusive forensic exam of Crowe's iPhone: a defense expert was allowed to conduct a "jailbreak" of the phone to pull out all deleted text messages. Typical for Millennials, when Marquette reviewed the jailbreak data, it found thousands of Crowe's texts and deleted texts. Crowe was a prolific texter. Notably, Marquette believed it found further evidence of Crowe's fraud on the court. On the Facebook text message app, Messenger,[7] Marquette found frequent texts between Crowe and fellow deckhand Falsev. However, before a certain date, there were no messages at all—causing Marquette to accuse Crowe of deleting all Falsev's texts before a certain date to

[7] Messenger is the popular mobile app that links to Facebook accounts, so that users can text message and even video call their Facebook friends. *See* I-Tunes App store, Messenger by Facebook, Inc, available at https://itunes.apple.com/us/app/messenger/id454638411?mt=8.

hide the texts in which he says he got hurt away from work and asked Falsev to lie for him.

Interestingly, these facts reveal an interesting twist for lawyers seeking deleted text messages in discovery—deleting text messages on the Facebook Messenger app does appear to make them irretrievable, but deleted text messages sent through the mobile phone itself can be recovered in a "jailbreak" of the phone's internal software. However, for those litigants attempting fraud on the court, deleting Facebook Messenger texts just deletes them from one user's account; recall that Falsev could still retrieve Crowe's messages from *Falsev's* Facebook account. In other words, texts, like other forms of digital communications, have a life of their own and can survive—and be found in discovery—for much longer than the life of a lawsuit. Though this point is perhaps something we have all come to understand in the digital age, the *Crowe* case illustrates the nuances of different communications media and how they may play out in discovery battles.

Counterclaim for Fraud and Pretrial Motions for E-Discovery Evidence

After uncovering what it believed was significant evidence of the plaintiff's fraud on the court, Marquette moved to file a counterclaim asserting, among other things, fraud under the general maritime law and damages under state law not in conflict with maritime law. This was a highly unusual move by a Jones Act defendant. Though many Jones Act employers would like to claim fraud, there are rarely sufficient facts to support a claim, and the law is murky as to the viability of a fraud claim against a Jones Act seaman. An interesting battle ensued—the magistrate judge denied Marquette leave to file a counterclaim,[8] but the district judge set aside the order and granted leave to file the counterclaim.[9] Marquette's damage claims sought to recover the hefty amounts it had paid for Crowe's medical care, which included surgery, and also

[8] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 54 (E.D. La. Mar. 3, 2015) (North, M.J.).
[9] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 90 (E.D. La. May 8, 2015) (Engelhardt, C.J.).

to recover payments directly to Crowe for seaman's maintenance, in addition to its litigation expenses. Crowe's lawyers then moved to dismiss the counterclaim, arguing Marquette failed to state a claim.[10] Marquette shot back with a concise statement of all the evidence uncovered during discovery that supported and established its fraud allegations.[11]

There were several interesting pretrial motions regarding the admissibility of many of Crowe's phone and Facebook text messages. Marquette wanted to present hundreds of Crowe's text messages as evidence at trial, and it attached these to their motions. Reading these text messages as attached to these motions as exhibits could make one frankly uncomfortable, as if one were peering into a stranger's deepest thoughts. Crowe texted about his hopes and dreams, business ventures he hoped to start in the Philippines, a friend's drug and criminal problems, often in a slang, vernacular style. No subject was off limits with his friends. Crowe is a typical Millennial who communicated electronically about everything. Had he been having an affair or had other private things to hide, lawyers on both sides, and anyone with a PACER account willing to take the time to pull court documents, would know all. In response, Crowe sought to present his texts about his suffering and economic woes.

Ultimately, the court ruled most of the texts and Facebook messages submitted by both sides were "truly hearsay and/or self-serving evidence" and were therefore not admissible unless properly used for impeachment. The court counseled the witnesses should testify and there be a "proper airing of evidence" through direct testimony.[12]

The parties went to trial entrenched in their positions: on the one hand, Crowe was an injured seaman deserving damages, on the

---

[10] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 100 (E.D. La. filed July 31, 2015).

[11] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 101 (E.D. La. filed Aug. 10, 2015). This brief makes for good reading as a detailed account of Marquette's efforts to uncover fraud and the legal arguments supporting the employer's ability to claim fraud against a Jones Act seaman.

[12] *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 2:14-cv-1130, Document 129 at p. 2 (E.D. La. Sept. 25, 2015) (Engelhardt, C.J.).

other, he was a manipulating deckhand using an off-work injury as a basis for lying about getting hurt at work. The outcome turned on witness credibility. Ultimately, surmising from the verdict, it appears Crowe was credible enough to avoid being found a fraud but the jury was otherwise not sympathetic to his claims.

The jury trial took place October 5 through 7, 2015. The jury split the baby: it found Crowe was injured on the tug, but Marquette was not negligent nor was the vessel unseaworthy.[13] Since the jury answered the first question, that Crowe was hurt on the vessel, in the affirmative, the jury form did not require it to reach the last questions—whether Crowe acted fraudulently. In the end, both sides walked away with nothing.

Lessons from the *Crowe* Case

An important takeaway from the *Crowe* case is that we, as lawyers, must have a basic understanding of how social media works, and we should consider routine education of clients that their social media accounts and texts may be subject to discovery. Early counseling with Crowe might have changed this case altogether—Crowe may have avoided electronic communications to (allegedly) ask a witness to lie and there would have been no smoking gun text message. It would have come down to a standard credibility battle between plaintiff and a fact witness, with no Facebook message to lend credence to the witness' story.

Another lesson from the *Crowe* case for lawyers is to question clients more rigorously before answering in written discovery that he or she has no Facebook account. Deactivated is not "deleted" for Facebook accounts. Crowe thought he was clever by deactivating his account, because it meant no one searching for his account would find it. However, he did not delete it, and all 4,000 pages of his account were just lying in wait to be reactivated and retrieved. A final lesson from this case is that if a client does take down material on social media that may be relevant, the lawyer

[13] The jury's detailed verdict form is in the court's record at Document 152-6, filed on October 7, 2015.

should advise the client to retain a copy or retain it in the lawyer's file. Had Crowe actually deleted his Facebook account, he probably would have faced sanctions for spoliation of evidence. Some of these attorney ethical issues will be discussed in more detail below.

NUTS AND BOLTS TO SOCIAL MEDIA DISCOVERY

Courts around the country have found social media data to be discoverable. Below are common objections raised to social media discovery—privacy and relevancy—and strategies to overcome such objections. Also discussed are practical tips to social media discovery.

Overcoming Common Objections

Privacy. The argument that social media information is subject to privacy protections can generally be overcome, and there is precedent sprinkled across jurisdictions.[14] Essentially, the response is that information shared through social networking sites such as Facebook or Twitter can be copied and disseminated by others, possibly strangers depending on the individual's privacy settings, so any concept of privacy is meaningless. As one New York state judge wrote, "If you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy."[15] In 2010, Facebook's Mark Zuckerberg discussed a new "social norm" of sharing information online, and the headlines ran, "Privacy is

[14] *See, e.g., Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Ca. 2012) ("Generally, [social media] content is neither privileged nor protected by any right of privacy.") (citation omitted); *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112 n.1 (E.D.N.Y. 2013) (rejecting arguments that a party's interest in privacy of their Facebook account requires a showing that the account actually contains information that would undermine the party's claims before the account data is discoverable because the Federal Rules do not require a party to prove the *existence* of relevant material before requesting it). Interestingly, in the criminal, Fourth Amendment context, the Supreme Court has assumed, but not held as such, that a municipal employee had a reasonable expectation of privacy in his text messages on a city-provided pager. *City of Ontario, California v. Quon*, 560 U.S. 746, 759 (2010).

[15] *People v. Harris,* 945 N.Y.S.2d 590, 595 (Crim. Ct. New York Co. 2012).

dead on Facebook."[16] Indeed, as early as 1999, Sun Microsystems' CEO Scott McNealy famously said to reporters, "You have zero privacy anyway. Get over it."[17]

Facebook's privacy settings, if utilized, do not generally provide much protection from disclosure in discovery. Facebook's settings allow you to limit some data to your "friends," but you still cannot control what your "friends" decide to share or post. Regardless of privacy settings, courts considering the issue generally (though not universally) recognize that information posted in social media is not truly private.[18]

Any privacy arguments will be balanced against the need for the discovery. Hence, counsel must have a factual predicate to obtain the discovery. For example, in a personal injury case where the plaintiff's quality of life post-accident is at issue, his photographs posted on-line prior to this accident and afterwards are arguably relevant to the issue. In *Nucci v. Target Corporation*,[19] a Florida court in 2015 ordered production of all photographs on the plaintiff's social networking sites from two years before the accident to date. The *Nucci* court stated:

> In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult

---

[16] Facebook did somewhat of an about-face in late 2014 when it added new and various privacy settings. However, speaking only as a casual user of Facebook, the privacy settings are confusing and require some digging to locate and activate.

[17] Wikipedia, Scott McNealy Article, https://en.wikipedia.org/wiki/Scott_McNealy (last visited Sept. 18, 2015).

[18] *See cf.*, *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 525-26 (S.D.N.Y. 2012) (finding, in Fourth Amendment context, where defendant used privacy settings that allowed only his "friends" on Facebook to see postings, he "had no justifiable expectation that his 'friends' would keep his profile private"); *see also A.D. v. C.A.*, 16 N.Y.S.3d 126, 128 (N.Y. Sup. Ct. 2015) ("A person's use of privacy settings on social media, such as Facebook, restricting the general public's access to private postings does not, in and of itself, shield the information from disclosure if portions of the material are material and relevant to the issues of the action.").

[19] *Nucci v. Target Corp.*, 162 So. 3d 146, 152-53 (Fla. Dist. Ct. App. 2015).

> for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit. The relevance of the photographs is enhanced, because the post-accident surveillance videos of Nucci suggest that her injury claims are suspect and that she may not be an accurate reporter of her pre-accident life or of the quality of her life since then. The production order is not overly broad under the circumstances, as it is limited to the two years prior to the incident up to the present; the photographs sought are easily accessed and exist in electronic form, so compliance with the order is not onerous.[20]

Relevance. As noted above, courts do require a threshold showing of relevance to allow social media discovery, especially if the discovery request is broad.[21] In the *Crowe* case, counsel could show the relevance of requested phone and Facebook data because

---

[20] *Id. at* 152.

[21] *See, e.g., Mailhoit v. Home Depot U.S.A., Inc*., 285 F.R.D. 566, 570 (C.D. Cal. 2012) ("[S]everal courts have found that even though certain [social media] content may be available for public view, the Federal Rules do not grant a requesting party 'a generalized right to rummage at will through information that [the responding party] has limited from public view' but instead require 'a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.'") (citation omitted); *Melissa "G" v. North Babylon Union Free School Dist.*, 6 N.S.S.3d 389, 391-92 (N.Y. Sup. Ct. 2015) (finding Facebook photographs showing plaintiff engaging in recreational activities are probative and relevant to her claim for loss of enjoyment of life and requiring she preserve all Facebook data and plaintiff's counsel to review all Facebook account data and produce relevant material).

a witness had given them a "smoking gun" Facebook message and claimed to have received other damaging texts from plaintiff. In other cases, personal injury claims alone provide some justification to get at social media content. For example, in a recent Florida case, *Tyer v. Southwest Airlines*,[22] the federal court ordered plaintiff to produce all post-injury photographs of herself posted on social media, because they were relevant to her physical condition, which she placed at issue by alleging personal injury damages.[23]

Counsel may have to lay a foundation for social media discovery, however, by establishing the party's use of social media, as noted below in the practitioner tip section. Ultimately, if the discovery request is adequately tailored to the relevance argument, a relevancy objection should be overruled.

Practice Tips for Social Media Discovery[24]

1. Take a "Snapshot" of the Party's Public Profile

Counsel—at least defense counsel in a personal injury matter—should conduct a search of the internet for plaintiff's social media presence early in case. Counsel should print or save the public information, which will help identify if the plaintiff later removes some content, such as photographs. Plaintiff's counsel, too, should consider counseling their clients on how social media

---

[22] *Tyer v. Southwest Airlines Co. f/k/a Airtran Airways, Inc.,* No. 14-cv-62899, 2015 WL 4537250, *2 (S.D. Fla. July 27, 2015).

[23] *See also Farley v. Callais & Sons LLC*, No. 14-2550, 2015 WL 4730729, *3-4 (E.D. La. Aug. 10, 2015) (denying carte blanche Facebook discovery of plaintiff's account but allowing certain relevant categories of Facebook discovery); *Giacchetto v. Patchogue-Medford Union Free School Dist*., 293 F.R.D. 112, 115-16 (E.D.N.Y. 2013) (denying full access to plaintiff's social networking postings but ordering production of any social networking postings referencing her emotional distress claims from the underlying incident and also postings that "refer to an alternative potential stressor" because she had "opened the door to discovery" on other sources or her emotional distress); *cf. Newill v. Campbell Transp. Co., Inc.*, 96 Fed. R. Evid. Serv. 527 (W.D. Pa. 2015) (finding plaintiff's Facebook posts indicating he had physical capabilities inconsistent with his claimed injuries to be relevant and admissible at trial, notwithstanding some embarrassment).

[24] These tips were drawn largely from the informative and detailed article by attorney Christopher B. Hopkins, *Ten Steps to Obtain Facebook Discovery in Florida*, Trial Advocate Quarterly (Spring 2015). The article contains detailed case discussions under Florida law and is highly recommended reading on this topic.

may be discoverable and used in litigation (as discussed below in further detail) and should also find out early in the court of representation what his or her client has put out there in social media.

2. Ask a Simple Interrogatory to Identify Accounts and User Name

Early in discovery, ask a single interrogatory for identification of the party's social media accounts—but just their existence and the username. Early discovery requests are not the time to start a discovery battle by seeking full access to accounts or passwords; the goal is to learn early on which platforms a party uses and what information he or she has openly available. The user name is important, since an internet search may not locate accounts if a pseudonym is used. If any new accounts are identified, go back to step one and take a snapshot of publicly-available content on those social media accounts.

A sample interrogatory, unlikely to draw credible objection, is:

> Identify your accounts on Facebook, Twitter, Instagram, LinkedIn, and Periscope, and your username on each account.

3. Ask Basic Social Media Questions in Deposition

Consider adding to your standard deposition outline a series of questions to get basic information about whether and how the party uses social media. Counsel should be trying to build relevance arguments to obtain more intrusive social media discovery, or to eliminate the issue altogether if he or she does not use social media (and you believe him or her!). On the flip side, particularly on the plaintiff's side, counsel should prepare clients to answer such questions and to not appear defensive or hedge answers. In other words, counsel should advise plaintiffs not to do as Crowe did in the *Crowe v. Marquette Transportation* case.

Questions to ask to build a case for further social media discovery:

- Confirm accounts and user names identified in written discovery.

- How often and which platforms are used; number of friends or followers.

- What type of information is posted or shared: Kids pictures? Pictures of yourself doing activities? Physical/emotional state?

- Any discussion of the lawsuit on social media, including the facts, the underlying accident, damages, or the dispute.

- Any altered or deleted content since the accident or dispute.

4. Develop a Reason to Obtain Social Media Discovery

Social media discovery follows the same basic rules of any other type of discovery—it must be relevant and, under the revised Federal Civil Rule 26(b)(1), *"proportional to the needs of the case*." This proportionality requirement is new to Rule 26 as of December 1, 2015, so it remains to be seen how or if this clause will change the scope of discovery. Regardless, counsel wishing to obtain social media information in discovery should expect to be required to state some credible facts, made in good faith, that make it likely that relevant material will be found on the party's social media accounts. Counsel's early investigation efforts should gather such facts, if they exist. In the *Crowe* case, defense counsel could point to an apparent text message conversation in which the plaintiff told a fellow employee he had been injured while fishing on his own time and asked him to lie about facts to support the plaintiff's case.

If defense counsel asked plaintiff the deposition questions above, he or she should be well positioned to build on both the relevance argument and on identifying targeted information for more intrusive discovery requests. For example, if plaintiff claims she is unable to perform her normal housework activities, and she testified in deposition that she posts 3 or 4 times a day and often includes her activities, counsel has a reason to ask for her Facebook status posts from the underlying incident to the present. Arguably, counsel could request pre-incident Facebook status posts because they would reveal plaintiff's pre-incident activities and allow comparison to post-accident activities.

5. Make a Targeted Request for Production

Identify the narrowest scope for an initial production request that should generate useful results. Start with a request that you have an articulable, case-specific reason for seeking. For example, if counsel learned in deposition that the plaintiff posted pictures of herself both before and after the accident (and her physical condition is at issue), counsel can articulate a reason to request photographs of plaintiff posted on social media for some limited time before the incident and after, and possibly only those photographs that depict the area of the body at issue in the lawsuit. Remember, the more tailored the request, the more likely a court will allow it. As the *Crowe* case illustrates, it cannot hurt to include a brief explanation of how to retrieve such data. However, by all means, if counsel has an articulable reason for a broad, intrusive discovery request, make it. For example, in the *Crowe* case, defense counsel's request for production stated:

> An unredacted, unedited digital copy of your entire Facebook page from the onset of your employment with Marquette until the present. (This is a simple process specifically provide under the "General Settings" page on Facebook. Just click on

> "Download a copy of your Facebook data" and follow the instructions.[25]

Defense counsel in *Crowe* already had at least one witness informing them that the plaintiff had texted and sent Facebook messages regarding how he was really hurt and what to say for the lawsuit, so as to justify this broad request. However, for the typical case without the smoking gun Facebook message to justify full access to the account, it would be prudent to conduct social media requests in more justifiable, targeted "bites." At a minimum, the requested data should be limited in timeframe. Should the requested material reveal a justification for a more intrusive social media discovery request, then counsel can make another request: one bite at a time.

ETHICAL CONSIDERATIONS FOR PRACTICE AND OTHER TAKEAWAYS FROM THE *CROWE CASE*

The *Crowe* case gives us insight into how important social media discovery can be to litigation and raises lots of ethical questions for our practice. Some of these are addressed below.

Do Lawyers Have a Duty to Educate Themselves about Social Media: A Question of Lawyer Competence?

Due to the growing use of social media in discovery, a working knowledge of social media and technology is ethically required for attorney competence in practice areas in which social media discovery may play a role. State bar associations are increasingly including discussion about social media knowledge and use in their ethical guidelines, and some bar associations have drafted specific guidelines to address social media. In 2013, the ABA Ethics 20/20 Commission added Comment 8 to its Model Rule 1.1: Competence:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and

[25] *Crowe,* Jan. 20, 2015 Order and Reasons (Document 32), at 2.

> its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[26]

Many state bar associations have adopted this comment, since the ABA Model Rules of Professional Conduct serve as models for the ethics rules of most states.

Related to this question is whether there is a duty to investigate the social media presence of an opposing party. In particular, for defense counsel in a personal injury matter, I would argue the answer is yes. While I am not aware of any findings of attorney malpractice for failure to inspect a plaintiff's social media presence, it is certainly foreseeable. It is advisable to investigate what is publicly available about the plaintiff on-line, and, as noted above, to take a "snapshot" of any social media account data to use as a baseline for any further social media discovery.

Is there a Duty to Educate Your Clients about Social Media?

Yes, depending on the case and the client. It may be prudent to educate your clients, whether plaintiffs or defendants, about social media use and potential pitfalls in litigation. Some lawyers who are particularly sensitive to these e-discovery issues put educational warning language in their initial correspondence to clients, so their clients are aware of how social media may impact their case. In particular, when taking on a plaintiff's personal injury matter, counsel should warn their clients that information they post to social media, or text to friends, could wind up as evidence against them in a lawsuit.

---

[26] American Bar Association, Comment on Rule 1.1, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html.

The North Carolina State Bar recently responded to a question of a lawyer's duty to advise clients about social media, stating:

> If the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.[27]

How Do Counsel Ethically Advise Clients about Using Social Media?

There are certainly ethical pitfalls. By simply telling your client that their communications on any electronic and social media platform may end up as evidence at trial, a lawyer may end up with a client who engages in spoliation and possibly even fraud.

1. Taking Down Posts

Generally, advising your client to delete negative social media data will run afoul of ethical rules when there is a duty to preserve such information. However, if the lawyer preserves information "taken down" from a client's social media or counsels his client to preserve the data, he may comply with his state's ethical rules. The North Carolina State Bar Ethics Committee has spoken on this point:

> If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media. The lawyer may take possession of printed or

[27] North Carolina State Bar, 2014 Formal Ethics Opinion 5, Opinion #1, available at http://www.ncbar.com/ethics/ethics.asp?page=528.

> bbdigital images of the client's posting made for purposes of preservation.[28]

Indeed, in 2013 a Virginia lawyer was suspended for 5 years and faced a trial court sanction of $542,000 for spoliation of Facebook evidence: the lawyer told his paralegal to advise his client to "clean up" his Facebook page by removing damaging photographs, denied in discovery that plaintiff even had a Facebook account, and later tried to hide his paralegal's emails with the plaintiff.[29] In the Virginia case, the lawyer admitted he had no familiarity with Facebook before the case. Apparently the picture that started the dispute portrayed plaintiff holding a beer, wearing a "I [Heart] Hot Moms" shirt, with two blond girls in the background. The plaintiff there, like Crowe, had deactivated his Facebook page and was forced to reactivate and produce the account data, which showed he deleted 16 photos after the "clean up" instruction.

2. Adding New Social Media Posts

The New York State Bar is on the cutting edge of addressing the thorny ethical issues surrounding social media. Last June their Commercial and Federal Litigation Section issued "Social Media Ethics Guidelines."[30] These Social Media Guidelines are well-drafted, and they address topics covered here and far beyond, such as furnishing legal advice through social media. One guideline of the Social Media Ethics Guidelines is particularly instructive here:

> Guideline No. 5.B: Adding New Social Media Content

---

[28] North Carolina State Bar, 2014 Formal Ethics Opinion 5, Op. # 2.

[29] The state bar disciplinary disposition in *In the Matter of Matthew B. Murray*, Virginia State Bar Docket Nos. 11-070-088405 & 11-070-088422 is available at http://www.vsb.org/docs/Murray-092513.pdf. The final court order in the underlying case, which discusses the Facebook evidence spoliation, is *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 301-03 (Va. 2013). The lawyer paid the sanction, presumably from his fees earned from the large jury verdicts.

[30] The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association are available at http://www.nysba.org/socialmediaguidelines/.

> A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim." [Citations omitted.]
>
> *Comment*: A lawyer may review what a client plans to publish on a social media website in advance of publication and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person's perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

This proposed New York ethical guideline provides a roadmap as to how to proactively advise your clients with respect to social media usage in litigation. Had Mr. Crowe been so advised (which he may have been), and had he taken that advice, he may not have used Facebook to allegedly tell a fellow deckhand how he "really" got hurt and the lies he wanted the deckhand to tell.

CONCLUSION

A final takeaway from this article: counsel should advise clients and conduct litigation as if nothing is truly ever irretrievable once it is posted in social media or sent electronically. It remains

somewhere, waiting to be retrieved from your Facebook history, or found by the recipient on his phone or Facebook Messenger account. Internet pages even get archived randomly in something called "The Wayback Machine,"[31] which allows you to "time-travel" into the Internet's history. As lawyers, we need to be conscious that people, especially Millennials, share their lives extensively on social media and text voraciously,[32] and this information can almost always be retrieved; we need to understand the basic benefits and pitfalls of social media usage and advise our clients accordingly.

[31] The Internet Archive's Wayback Machine, available at https://archive.org/web/, is a digital archive of the Internet that regularly takes "snapshots" of websites, providing access to older versions of a webpage.

[32] Interestingly, the plaintiff's emails in the *Crowe* case were never at issue, likely because he did not use email much. Texting and posting offer more interactive platforms for Millennials, perfect for casual, non-professional communications. Of course, email communications still feature prominently in commercial litigation, in which the witnesses tend to communicate with professional colleagues by email. Hence, e-discovery of email accounts still keeps many litigators up late. However, in personal injury arena, social media and texts tend to feature more prominently than email—at least where discovery battles are concerned.

INTRODUCTION TO THE MARITIME LABOUR CONVENTION, 2006*

By Douglas B. Stevenson[1]

The Maritime Labour Convention, 2006 ("MLC, 2006") is the most significant development in the long history of the law of seafarers' rights. It provides in one convention a comprehensive statement of seafarers' rights that reflect both those that have withstood the test of time as well as modern shipping realities. The MLC, 2006 is easy to understand, capable of ratification, and enforceable. The most important aspect of the MLC, 2006 is its underlying principle of respecting and honoring merchant mariners.

The MLC, 2006 sets international standards for seafarers' working and living conditions. It consolidates more than 65 international labor conventions and recommendations that have been adopted by the International Labour Organization since 1920.

Sources of Seafarers' Rights Laws

Seafarers are the most regulated of all workers. Virtually every aspect of their shipboard being: their work, their sleep, their food, their recreation, their hiring, their dismissal, their health, their sickness, and even their death are regulated.

The laws regulating seafarers and protecting their rights are derived from the general maritime law and in statutes enacted by

[1] Douglas B. Stevenson, Esq. is the Director of The Center for Seafarers' Rights of The Seamen's Church Institute of New York and New Jersey, providing legal assistance and advocacy for merchant mariners worldwide. He also serves as President of the Life Saving Benevolent Association of New York and is Past Chairman of the International Christian Maritime Association. He is a graduate of the U.S. Coast Guard Academy, is admitted to the Bar in New York State and the State of Florida, and is a retired U.S. Coast Guard officer.

(This paper was first presented at the 2015 Fall Meeting of The Maritime Law Association of the United States in Bermuda.)

maritime nations that are often influenced by the general maritime law and by international conventions.

The general maritime law is customary international maritime law that developed out of commercial customs and practices that were followed in ancient times. The protections for seafarers were therefore also based upon commercial interests. In other words, protecting seafarers was in the best interests of promoting commerce. It is because of their vulnerability as well as their importance to commerce that the general maritime law has for centuries provided seafarers extraordinary protections.

The first written maritime codes that appeared in the 11th to 13th centuries provided remarkable protections for ship's crews, even by current standards. These codes followed commercial practices that had developed in Mediterranean shipping in the pre-Christian era. For example, the ancient codes' provisions for seafarers' medical care are still superior to modern land workers' compensation rights. The codes guaranteed that ship's crews would be repatriated to their home at the end of their voyage. The codes also required that ship's crews be provided decent lodging and sustenance.

Enlightened lawmakers did not enact these ancient seafarers' protections for charitable or humanitarian reasons. Seafarers' protections developed out of the self-interest of maritime commercial enterprises. In simple terms, if you wanted your ship and its cargo to get to its destination, you needed to attract and retain skilled and reliable ships' crews.

By the beginning of the 20th Century, workers unrest about labor conditions grew in industrialized countries, and trade unions gained increasing influence. Their demands for social justice and higher living standards for workers were heard at the end of the First World War, where the participants in the Paris Peace Conference recognized workers' significant contributions to the war efforts, both on the battlefield and in industry. In 1919, the Treaty of Versailles created the International Labor Organization. The principal reason for creating the ILO was humanitarian:

international standards were needed to improve labor conditions. Political and economic reasons also inspired the creation of the ILO: without improvements in working conditions, social unrest was inevitable, but without international standards, countries initiating social reforms could be at a competitive disadvantage with those which did not.

The ILO was mandated to establish international labor standards in a variety of industries, and from its very beginning in 1919, the ILO focused its attention on seafarers. From 1920 to 2005, ten International Labor Conferences adopted 68 distinctly maritime conventions and recommendations.

The January 2001 agreement between shipowners and trade unions, later known as the "Geneva Accord," called upon the ILO to consolidate and update existing ILO Conventions and Recommendations into a new, single "framework Convention" on maritime labor standards. The Geneva Accord was unprecedented in the scope of the work it recommended, the extent of its collaboration between the social partners on such a major initiative, and in its ambitions to make shipping safer and more humane by creating a "super convention" to serve as the "fourth pillar" of international law. It proposed to go beyond the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention from Ships (MARPOL) and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW) by comprehensively addressing the human factors of life and work on commercial vessels.

On February 23, 2006 the Tenth Maritime Session of the International Labor Conference, adopted the Maritime Labor Convention. There were no votes against the Convention. One hundred and six countries participated in the Conference, including over eleven hundred accredited participants. The MLC, 2006, consolidates thirty-seven of the forty ILO maritime Conventions, as well as thirty ILO Recommendations. It is the first ILO convention to consolidate nearly an entire sector of older ILO conventions.

The MLC, 2006 represents the most significant development in the long history of seafarers' rights law. In one hundred pages, it provides a comprehensive statement of seafarers' rights that reflect seafarers' rights that have withstood the test of time, as well as modern shipping realities. The MLC, 2006 includes standards for conditions of employment, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection for seafarers, regulating recruitment and placement services, and flag State inspection systems. For the first time in any ILO Convention, the MLC, 2006 includes seafarers' rights to shore leave. The Convention provides seafarers with the right to make complaints both on board and ashore.

Format of the MLC, 2006

The MLC, 2006 is organized by **Articles, Regulations**, and a **two-part Code.** The two parts of the Code are Standards (Part A) and Guidelines (Part B).

The Articles are broad mandatory principles. They are followed by more detailed Regulations, which are also mandatory. The Code provides even more detailed mandatory Standards (Part A) and recommendatory Guidelines (Part B). The Standards and Guidelines are interrelated. The Guidelines, while not mandatory, are helpful and sometimes essential for a proper understanding of the Regulations and the mandatory Standards. In some cases, the mandatory Standards are so generally worded it may be difficult to implement them without the guidance in the corresponding provisions of the Guidelines.

The Regulations and the Code are divided into five Titles:

Title 1: Minimum requirements for seafarers to work on a ship

Title 2: Conditions of employment

Title 3: Accommodation, recreational facilities, food and catering

Title 4: Health protection, medical care, welfare and social security protection

Title 5: Compliance and enforcement

The MLC, 2006 also contains an Explanatory note that is not mandatory, but has been included to help countries implement the MLC, 2006.

The MLC, 2006 also uses a **vertically integrated** format with a numbering system that links the Regulations, Standards and Guidelines. Each Regulation also has a "plain language" purpose clause.

For example:

Regulation 1.2 – Medical certificate

Purpose: To ensure that all seafarers are medically fit to perform their duties at sea

1. Seafarers shall not work on a ship unless they are certified as medically fit to perform their duties.
...

Standard A1.2 – Medical certificate

The competent authority shall require that, prior to beginning work on a ship, seafarers hold a valid medical certificate attesting that they are medically fit to perform the duties they are to carry out at sea.
...

Guideline B1.2 – Medical certificate

Guideline B1.2.1 – International Guidelines...

Application of the MLC, 2006

The MLC, 2006 is intended to provide international labor standards for most of the world's seafarers. Except for a few

specific exclusions and areas where flexibility is provided for national authorities to exempt smaller ships (200 gross tonnage and below) that do not go on international voyages from some of its aspects, the MLC, 2006 applies to all ships (and to the seafarers on those ships) whether publicly or privately owned that are ordinarily engaged in commercial activities.

The definition of "seafarers" protected by the MLC, 2006 is very broad. It includes all persons employed or engaged or working in any capacity on a covered ship. The MLC, 2006 provides some national flexibility allowing Member nations to exclude some categories of persons from its application.

The definition of "ship" makes the MLC, 2006 applicable to all commercial ships, both publicly and privately owned with few exceptions. The MLC, 2006 allows Flag States to exempt from some of the its standards smaller ships (200 gross tons and below) that do not make international voyages. The MLC, 2006 does not apply to:

- ships which navigate exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply;
- ships engaged in fishing; ships of traditional build such as dhows and junks; or
- warships or naval auxiliaries.

The definition of "shipowner" is intended to extend the requirements of the MLC, 2006 to all persons and organizations that have or have assumed responsibilities for seafarers on ships. The definition includes owners, managers, agents, and bareboat charterers.

Entry into Force

The MLC, 2006 entered into force on August 20, 2013, twelve months after it was ratified by 30 ILO member nations with at least 33 per cent of the world's gross tonnage of ships.

Effect on Existing ILO Conventions

When an ILO member nation ratifies the MLC, 2006, it updates all of the existing ILO maritime labor conventions that have been consolidated into the MLC, 2006. Countries that ratify the MLC, 2006 are not be bound by the ILO maritime conventions that existed when the MLC, 2006 entered into force. Countries that have not ratified the MLC, 2006 remain bound by the ILO conventions they have ratified, but those conventions will be closed to further ratification. Seafarers' Identity Document Conventions (ILO-108 and ILO-185) are not included in the MLC, 2006.

Updating the MLC, 2006

The MLC, 2006 establishes procedures for updating it that allow technical parts to be amended by a simplified, accelerated process that does not require the entire MLC, 2006 to be revised. The Special Tripartite Committee keeps the MLC, 2006 under continuous review. The Special Tripartite Committee is comprised of Governments that have ratified the MLC, 2006 and Shipowner and Seafarer representatives chosen by the ILO Governing Body. Non-ratifying nations and non-governmental organizations can also participate in the Special Tripartite Committee, but without a vote. In 2014, the Special Tripartite Committee adopted two amendments to the MLC, 2006 relating to abandonment and seafarers' claims for death and long-term disability that will enable shipowners to have financial security to cover abandonment, seafarers' death and long-term disability entitlements. The amendments are expected to come into force in 2017.

MINIMUM REQUIREMENTS FOR SEAFARERS TO WORK ON A SHIP

Minimum Age 1.1

Purpose: To ensure that no under-age persons work on a ship

The minimum age for working on a ship is 16. Special attention should be given to the needs of young persons under the age of 18. For example, seafarers under the age of 18 should not work at night. Night work is defined by national law or practice covering a period of at least nine hours starting no later than midnight and ending no earlier than 0500. Exceptions to the night work requirements can be made by national authorities for training and other purposes.

Medical Certificates 1.2

Purpose: To ensure that all seafarers are medically fit to perform their duties at sea.

Seafarers must have a valid medical certificate to work on a ship. The medical certificate attests a seafarer's medical fitness to perform his or her duties. The medical fitness standards are established by national authorities in consultation with shipowners' and seafarers' organizations. The standards set by the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) are also valid. Medical certificates must be issued by qualified medical practitioners and are valid for no more than two years. Medical Certificates for seafarers under the age of 18 are valid for up to one year. Color vision certificates can be valid for up to six years.

Training and Qualifications 1.3

Purpose: To ensure that seafarers are trained or qualified to carry out their duties on board ship

The MLC, 2006 confirms the principle that all seafarers must be trained and qualified for their duties aboard ship, but it defers to the IMO's STCW to set training and qualification requirements. For those occupations not covered by STCW standards, the ILO standards previously adopted by an ILO Member nation will continue until standards are established by IMO or until five years after the MLC, 2006 enters into force, whichever is earlier.

Recruitment and Placement 1.4

Purpose: To ensure that seafarers have access to an efficient and well-regulated seafarer recruitment and placement system

Recruiting and placement agencies for seafarers must be regulated by countries in which they operate. Flag states cannot regulate placement agencies outside of their territory, but they must require shipowners of ships flying their flag that use placement agencies to use only placement agencies that conform to the requirements of the MLC, 2006.

Standards for placement services include:

Placement services are prohibited from charging fees to seafarers. Seafarers can be required to pay the costs of obtaining a national medical certificate, national seafarers' book, passport, and other travel documents. The costs of visas, however, must be borne by shipowners.

- Placement services are prohibited from black-listing seafarers.
- Placement services must ensure that seafarer's contracts are explained to them and that they receive a copy of their contract.

- Placement services must maintain insurance or other system to compensate seafarers' monetary losses suffered because of the placement service's or shipowner's contractual defaults.

Nations must maintain a system for investigating complaints about seafarers' placement services.

CONDITIONS OF EMPLOYMENT

Seafarers' Employment Agreements - Regulation 2.1

Purpose: To ensure that seafarers have a fair employment agreement

Flag states must implement the requirements of the MLC, 2006 for seafarers' employment agreements for seafarers working on their ships though their laws or regulations. Seafarers must be provided written seafarers' employment agreements that are clearly written and enforceable. They must be given an opportunity to review the seafarers' employment agreements and to get advice on their terms and conditions before signing them. Collective agreements can be incorporated into seafarers' employment contracts.

Some of the requirements for seafarers' employment agreements include:

Agreements must be signed by both the seafarer and the shipowner;

Seafarers must be given the opportunity to examine the agreement and get advice on its terms and conditions before signing it;

Seafarers and shipowners shall receive signed original agreements;

- Seafarers must be provided with a record of employment on the ship;

Agreements must be available in the English language, except for vessels on domestic voyages;

Agreements must contain the information specified in the MLC, 2006.

Wages - Regulation 2.2

Purpose: To ensure that seafarers are paid for their services

Flag states must adopt laws or regulations that ensure seafarers are paid their wages according to the requirements of the MLC, 2006. The MLC, 2006 sets out basic requirements for paying wages to seafarers, but it does not specify the amount of wages that must be paid. Wages must be paid at least once a month. The MLC, 2006 also requires flag states to require shipowners to provide seafarers with a way to make allotments to their families, dependents, or legal beneficiaries.

Hours of Work and Hours of Rest – Regulation 2.3

Purpose: To ensure that seafarers have regulated hours of work or hours of rest

Hours of work and hours of rest for seafarers must be regulated. The limits apply to all seafarers, not only watchstanders. Records of seafarers' daily hours of work or rest must be maintained and be available to seafarers and enforcement authorities. The limits can be exceeded if work is required for immediate safety of the ship, persons or cargo on board, or to give assistance to other ships or persons in distress at sea.

The limits on hours of work or rest are:

- Maximum hours of work cannot exceed 14 hours in any 24-hour period; and 72 hours in any seven-day period
- Minimum hours of rest cannot be less than 10 hours in any 24-hour period; and 77 hours in any seven-day

period. (Using hours of rest requirements will allow 91 hours of work in a seven-day period)

Entitlement to Leave - Regulation 2.4

Purpose: To ensure that seafarers have adequate leave

In addition to requiring annual leave for seafarers, the MLC, 2006 establishes seafarers' right to shore leave. Annual leave with pay shall be calculated on the basis of at least 2.5 calendar days per month of employment. The rights to shore leave are not explained in the Standards or Guidelines. The Regulation simply requires that "Seafarers shall be granted shore leave to benefit their health and well-being and with the operational requirements of their positions.

Repatriation – Regulation 2.5

Purpose: To ensure that seafarers are able to return home

In most circumstances, seafarers are entitled to be repatriated at the shipowner's expense. Shipowners should be required to provide financial security to ensure that their repatriation obligations are fulfilled. If shipowners fail to meet their repatriation obligations the flag state should make arrangements for repatriation. If the flag state fails to repatriate seafarers, then the port state or the seafarer's state of nationality can repatriate the seafarer and collect its expenses from the flag state. The MLC, 2006 establishes the standards for seafarers' rights to repatriation. Shipowners are prohibited from requiring seafarers to make an advance payment towards repatriation expenses and also from recovering repatriation expenses from seafarers' wages. Seafarers can be required to pay repatriation expenses and have the expenses deducted from earned wages when they are in serious default of their employment obligations.

Compensation for Ship's Loss or Foundering – Regulation 2.6

Purpose: To ensure that seafarers are compensated when a ship is lost or has foundered

Seafarers are entitled to compensation for injury, financial loss, and unemployment when the ship on which they are employed is lost or has foundered. National law should establish the amount of compensation. The guidelines allow the indemnity to be limited to two month's wages.

Manning Levels – Regulation 2.7

Purpose: To ensure that seafarers work on board ships with sufficient personnel for the safe, efficient and secure operation of the ship

The MLC, 2006 requires flag states to require all of its ships to have a sufficient number of seafarers employed on board to ensure that ships are operated safely and efficiently, taking into account security requirements, seafarer fatigue, and the particular conditions of the voyage.

Career and Skill Development and Opportunities for Seafarers' Employment – Regulation 2.8

Purpose: To promote career and skill development and employment opportunities for seafarers

Member nations are required to have national policies to promote employment in the maritime sector and to encourage career and skill development and greater employment opportunities for their seafarers.

ACCOMMODATION, RECREATIONAL FACILITIES, FOOD AND CATERING

Accommodation and Recreational Facilities – Regulation 3.1

Purpose: To ensure that seafarers have decent accommodation and recreational facilities on board

Flag states are responsible for ensuring that the MLC, 2006 requirements for accommodation, recreational facilities, food, and catering are implemented on ships flying their flags. The MLC, 2006 provides detailed and technical requirements for the physical design and structural layout of ships. Provisions affecting ship construction and equipment do not apply to ships constructed before the MLC, 2006 came into force for the country concerned. Smaller ships (200 gross tonnage and below) may be exempted from specific accommodation requirements. Detailed standards are specified for the following:

- Design and construction
- Ventilation
- Heating
- Lighting
- Sleeping rooms
- Mess rooms
- Sanitary accommodation
- Hospital accommodation
- Other facilities
- Bedding, mess utensils and miscellaneous provision
- Recreational facilities, mail and ship visit arrangements
- Prevention of noise and vibration

Food and Catering – Regulation 3.2

Purpose: To ensure that seafarers have access to good quality food and drinking water provided under regulated hygienic conditions

Flag states are primarily responsibility for ensuring that the MLC, 2006 standards for food and catering are followed on their ships. Food and drinking water supplies, having regard to the number of seafarers on board and their religious requirements and cultural practices relating to food, must be suitable in respect to quantity, nutritional value, quality, and variety. The catering department's organization and equipment must be adequate to provide seafarers with adequate, varied and nutritious meals prepared and served in hygienic conditions.

HEALTH PROTECTION, MEDICAL CARE, WELFARE AND SOCIAL SECURITY PROTECTION

Medical Care on board ship and ashore – Regulation 4.1

Purpose: To protect the health of seafarers and ensure their prompt access to medical care on board ship and ashore

Flag states must ensure that all seafarers working on their ships have health protection coverage and prompt access to medical care on vessels and ashore. A port state must provide access to its medical facilities to all seafarers on ships in its territory. Seafarers must be provided levels of health protection and medical care that is comparable to that available to workers ashore. National regulations must establish standards for on-board hospital and medical care facilities and equipment. Requirements for medical chests, medical doctors on ships carrying 100 or more persons, medical qualifications for persons on ships that do not carry a doctor, and 24/7 radio or satellite medical advisory systems are specified.

Shipowners' liability – Regulation 4.2

Purpose: To ensure that seafarers are protected from the financial consequences of sickness, injury, or death in conjunction with their employment

Shipowners are obligated to pay for medical care expenses, including housing and subsistence during recuperation for seafarers' illnesses or injuries incurred between the times when they began duty until they are repatriated. National laws can exclude shipowners' liability to pay for injuries or sicknesses that were caused by the seafarer's own willful misconduct or were intentionally concealed when the seafarer was hired. National laws can limit shipowners' liability to pay medical expenses to not less than 16 weeks from the day the injury or commencement of the sickness. Shipowners are liable to pay burial expenses for seafarers who die on board or ashore during the period of employment.

Health and Safety Protection and Accident Prevention – Regulation 4.3

Purpose: To ensure that seafarers' work environment on board ships promotes occupational safety and health

This section requires flag states to adopt regulations designed to prevent accidents, injuries, and illnesses on their ships. National health and safety protection and accident prevention regulations should include the following standards:

- Precautions to prevent accidents, injuries, and diseases, including exposure to harmful levels of ambient factors and chemicals or other substances;

Providing personal safety equipment and training on its use;

- Inspecting, reporting, and correcting unsafe conditions; and
- Reporting and investigating occupational accidents.

Shore-based Welfare Facilities – Regulation 4.4

Purpose: To ensure that seafarers working on board a ship have access to shore-based facilities and services to secure their health and well-being

The responsibilities of port states relating to shore-based welfare facilities for seafarers are largely contained in the Guidelines' recommendations. Port states are required to promote developing shore-based welfare facilities for seafarers in their ports, and they are also encouraged to establish welfare boards to regularly review seafarers' welfare facilities and services to ensure that they are appropriate for seafarers' needs. Port states are required to ensure that existing facilities are easily accessible to seafarers, irrespective of the seafarers' nationality, race, color, sex, religion, political opinion, or social origin and irrespective of the flag state of the ship on which they are employed. Port states are encouraged to ensure that seafarers' welfare facilities are available in their ports, but they are not obligated to finance them.

Social Security – Regulation 4.5

Purpose: To ensure that measures are taken with a view to providing seafarers with access to social security protection

Social security protections are vastly different from country to country and reflect each country's national practices. National social security protections often exclude persons who are not residents or nationals. This section provides flexible requirements for Member States to provide social security protections for seafarers to ensure that seafarers and their dependents are not left without protections. Member States must ensure that the social security protections that are provided to seafarers and their dependents are at least as good as those provided for shore workers. Member States must also undertake steps toward progressively achieving comprehensive social security protections for seafarers. Provision is made for national circumstances and for bilateral, multilateral, and other arrangements in connection with social security coverage.

Member States must provide at least three of the following nine branches of social security protection for seafarers, and they should attempt to progressively add more:

- Medical care;
- Sickness-benefit;
- Unemployment benefit;
- Old-age benefit;
- Employment injury benefit;
- Family benefit;
- Maternity benefit;
- Invalidity benefit; and
- Survivors' benefit

The social security benefits that Member States are required to provide are in addition to those that would be provided by shipowners in 4.1 and 4.2. The shipowners' obligations in 4.1 and 4.2 are generally short-term benefits. The Member State's obligations in 4.5 are intended to cover long-term benefits.

COMPLIANCE AND ENFORCEMENT

Title 5 provides an innovative and comprehensive system of compliance and enforcement mechanisms for flag states, port states, labor-supplying states, seafarers, and shipowners including inspections, certification, grievance procedures, and investigations. A fundamental tenet of this Title is that seafarers and shipowners, like all other persons, are equal before the law and are entitled to equal protection of the law. As such, they should not be subject to discrimination in their access to courts, tribunals or other dispute resolution mechanisms. The MLC, 2006 is enforced by the

seafarers' complaint procedures, shipowners' and shipmasters' supervising conditions on their ships, flag states exercising jurisdiction and control over their ships, and port states inspecting foreign ships.

Flag State Responsibilities – Regulation 5.1

Purpose: To ensure that each Member implements its responsibilities under this Convention with respect to ships that fly its flag

In accordance with existing international law requirements, the flag states are primarily responsible for ensuring that requirements of the MLC, 2006 are followed on ships flying their flags. Flag states may authorize other organizations, called "recognized organizations," to perform some of their inspection functions, but the flag states still retain full responsibility for inspecting and certifying living and working conditions on their ships.

Maritime Labor Certificate

All ships 500 gross tons or more that operate internationally must have a Maritime Labor Certificate issued by the flag state. The Maritime Labor Certificate certifies that the working and living conditions on the ship have been inspected and conform with the national laws, regulations, or other measures implementing the MLC, 2006. Importantly, the certificate identifies the shipowner responsible for satisfying shipowner obligations under the MLC, 2006.

Declaration of Maritime Labor Compliance

All ships 500 gross tons or more that operate internationally must have a Declaration of Maritime Labor Compliance (DMLC). The DMLC, which is attached to the Maritime Labor Certificate, summarizes the national laws or regulations implementing an agreed-upon list of 14 areas of the maritime standards and describes the shipowner's plan for implementing the Convention that will be

maintained on the ship between inspections. The summary of national laws and regulations are contained in DMLC Part 1 prepared by the flag state. The shipowner's plan for implementing the MLC, 2006 is contained in DMLC Part 2 prepared by the shipowner.

Inspection and Enforcement

Flag states must inspect their vessels for compliance with MLC, 2006 at least once every three years. If an inspection is based on a complaint, the inspector must maintain the confidentiality of the source of the complaint or grievance and must not reveal to the shipowner that the inspection was made in response to a complaint. Vessels can be detained to correct deficiencies that present a significant danger to seafarers' health, safety, or security.

On-Board Complaint Procedures

Flag states must establish on-board grievance procedures to handle seafarers' complaints alleging violations of the MLC, 2006 that are fair, effective, and expeditious. The procedures should allow seafarers to be accompanied or represented during the complaints procedure, as well as provide safeguards against retaliation against the seafarer for making a complaint.

Marine Casualty Investigations

Flag states must conduct an investigation of any casualty that resulted in death or serious injury involving a vessel flying their flag.

Port State Responsibilities – Regulation 5.2

Purpose: To enable each Member to implement its responsibilities under this Convention regarding

international cooperation in the implementation and enforcement of the Convention standards on foreign ships.

Port State Control

Port states may, but are not required to, inspect any foreign ship in its ports for compliance with the MLC, 2006. Ships from countries that have not ratified the MLC, 2006 are subject to port state control inspections and to possible detention if they do not meet the minimum standards of MLC, 2006. The inspection should normally be limited to examining the vessel's Maritime Labor Certificate Declaration of Labor Compliance. Inspections can go beyond the certificate or declaration if:

- Required documents are not produced or are not properly maintained:,
- There are clear grounds for believing that the ship does not conform with the MLC, 2006;
- There are reasonable grounds to believe that the ship has changed flags to avoid complying with the MLC, 2006;
- There is a complaint alleging that the ship does not conform to the MLC, 2006.

Any person with an interest in the safety of the ship, including an interest in safety or health hazards to seafarers on board, may make a complaint to port state control authorities about conditions on a ship that do not conform to the MLC, 2006. Inspections made in response to the complaint should generally be limited to matters within the scope of the complaint. Vessels can be detained by port state control to correct deficiencies that present a significant danger to seafarers' health, safety, or security.

Onshore Seafarer Complaint-handling Procedures

Port states must provide procedures giving seafarers on ships in their ports the opportunity to report violations, including violations of seafarers' rights established in the MLC, 2006. Upon receipt of the report the authorized port officer should conduct an initial investigation. The officer should then take the following steps to resolve the complaint at the lowest possible level:

- Ensure that the on-board grievance procedure has been attempted, if appropriate;
- Conduct a port state control inspection;
- If detaining the ship following a port state control inspection is not appropriate and the complaint has not been resolved by the on-board grievance procedure, the authorized officer should seek the advice and a corrective plan of action from the flag state;
- Unresolved complaints should be reported to the ILO and to the appropriate shipowners' and seafarers' organizations in the port state.

Labor-supplying Responsibilities – Regulation 5.3

Purpose: To ensure that each Member implements its responsibilities under this Convention as pertaining to seafarer recruitment and placement and the social protection of its seafarers

The MLC, 2006 recognizes that flag states the primary responsibility for regulating seafarers' working and living conditions on their ships. The provisions of the MLC, 2006 relating to regulating seafarers' recruiting and placement agencies as well as some of its social security requirements must be enforced by labor-supplying countries. The MLC, 2006 requires labor-supplying

Members to establish an effective inspection and monitoring system for enforcing its labor-supplying responsibilities.

The MLC, 2006 provides a comprehensive, concise, and understandable framework for the protection of seafarers that recognizes the contribution they make to the maritime industry.

RESOURCES

The International Labour Organization has a section of its website devoted to the MLC, 2006. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_ILO_CODE:C186:NO

It contains the text of the MLC, 2006 at:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO

John Isaac Blanck Jr., Reflections on the Negotiation of the Maritime Labor Convention 2006 at the International Labor Organization, 31 Tulane Maritime Law Journal 121 (Winter 2006)

Robert Force and Martin J. Norris, The Law of Seamen, 5th Edition, (2003)

Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th Edition (2001)

Peter B. Payoyo, A Primer on the International Bill of Rights for Seafarers, Parola, 2006

International Shipping Federation, ILO Maritime Labour Convention: A Guide for the Shipping Industry, 1st Edition (2006)

TABLE OF CASES

Page(s)

CASES